Petition

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81-290

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. _____

COMPAGNIE DES BAUXITES DE GUINEE,
a corporation,

Petitioner,

v.

THE INSURANCE CORPORATION OF IRELAND,
LTD., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

This case presents two questions: (1) whether a federal court may enjoin a party before it from continuing to prosecute a vexatious, harassing and duplicative action brought in bad faith in a foreign country, and (2) whether certain contacts with the forum were sufficient to subject parties to the in personam jurisdiction of that forum.

Parent companies of the petitioner are Halco (Mining) Inc., which owns 51% of the shares of petitioner, and the Republic of Guinea, which owns the remaining 49%. Halco (Mining) Inc. is a Delaware corporation. A list of the remaining twenty respondents is found on page 2 of this Petition.

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THE INSURANCE CORPORATION OF IRELAND,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 10, 1981.*

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*The following is a list of all twenty-one of the respondents:

Eagle Star Insurance Co., Ltd., Hanover Insurance Company, Continental Assurance Company of London Ltd., The Century Insurance Co. Ltd., Yuval, The Insurance Company of Israel Ltd., Home Insurance Co., Ltd., Slater, Walker Insurance Co. Ltd., Yasyda Fire & Marine Insurance Co. (UK) Ltd., Nichido Fire & Marine Insurance Co. Ltd., Turegum Insurance Company, Sahar Insurance Co. Ltd., Excess Insurance Co. Ltd., Trident Insurance Co. Ltd., Vesta (UK) Ltd., Chiyoda Fire & Marine Insurance Co. Ltd., Toyko, Stronghold Insurance Co. Ltd., British Reserve Insurance Co. Ltd., English & American Insurance Co. Ltd., Consolidated European Reinsurance Co. Ltd., L'Union Atlantique S.A. D'Assurances Brussels, all being corporations.

OPINION BELOW

The opinions of the court of appeals are set forth as Appendix A hereto, and the order of the district court is set forth as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 10, 1981. Timely petitions for rehearing filed by both appellants and appellee were denied by the court of appeals in an order entered on July 7, 1981. An order granting petitioner's motion for stay of mandate was entered on July 13, 1981, and this petition for certiorari is filed within 90 days of the order denying rehearing and within 30 days

of the order granting stay of mandate. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case presents two questions: (1) whether a federal court may enjoin a party before it from continuing to prosecute a vexatious, harassing and duplicative action brought in bad faith in a foreign country, and (2) whether certain contacts with the forum were sufficient to subject parties to the in personam jurisdiction of that forum.

STATEMENT OF THE CASE

Petitioner Compagnie des Bauxites de Guinee, a Delaware corporation engaged in the mining of bauxite in the

Republic of Guinea in West Africa, commenced this action in 1975 against its insurers based upon business interruption insurance contracts. The petitioner had obtained $20,000,000 of business interruption coverage in two layers from a primary insurer (covering the first $10,000,000) and the respondent excess insurers (covering the excess layer of $10,000,000). Respondents did not issue their own policy but adopted the form of the primary policy "as far as applicable."

Petitioner seeks recovery for certain business interruption losses in this diversity suit against the insurers, the petitioner being a Delaware corporation with its principal place of business in the Republic of Guinea and the defendants being corporations with their places of incorporation and principal

places of business outside Delaware. Defendant INA, the insurer of the primary layer, which was not a party to the appeal and is not involved in this petition, is a Pennsylvania corporation with its principal place of business in Pennsylvania. Respondent excess insurers are twenty-one companies which write insurance through the London and Brussels insurance markets, all incorporated outside of Delaware.

The excess insurers answered on the merits in 1975 and later filed a series of motions to dismiss, including a motion to dismiss for lack of personal jurisdiction. The excess insurers also instituted a suit in England in 1979, over three years after the commencement of this case, seeking to void the policy of insurance. The policy had, by its terms, lapsed, so that the only reason for

commencing the English action was to harass the petitioner and further delay the American action. The excess insurers sought a declaration that the policy was void from its inception, due to alleged "material nondisclosures" by the insured when the coverage was first obtained.

The district court, based on clearly sufficient evidence, found that it had personal jurisdiction over the excess insurers and that their English action was duplicative of the case before it and was instituted in bad faith as a means of vexing and harassing the insured, and it enjoined the excess insurers from further prosecution of that action during the pendency of this case.

The court of appeals upheld the district court's finding of personal

jurisdiction over eighteen of the twenty-one respondents, but the court of appeals reversed the district court's order granting the injunction, holding that the injunction breached the comity owed by federal courts to courts of foreign sovereignties. It did not reverse the district court's findings that the foreign action was harassing and vexatious, but stated that those findings "d[id] not affect our decision." Infra, Appendix A at 19. The court of appeals also reversed the district court's finding of in personam jurisdiction over three of the twenty-one respondents. Infra, Appendix A at 18.

REASONS FOR GRANTING THE WRIT

The Third Circuit opinion brings into question the scope of prior

decisions of this Court and also is in conflict with decisions of other circuits. To resolve these conflicts and to further clarify the scope of the equity powers of the federal courts to enjoin parties from pursuing vexatious and harassing suits in foreign courts, this Court should grant the writ.

I.

The Third Circuit opinion creates a new rule, in unwarranted extension of this Court's opinion in Donovan v. City of Dallas, 377 U.S. 408 (1964) and in direct conflict with prior decisions of other circuits, that a district court may not enjoin an action brought by parties before it in a foreign country even if it finds the foreign action to be vexatious, harassing and brought in bad

faith. The Third Circuit conclusion conflicts with decisions in other circuits which have recognized that a party who commences a duplicative, vexatious and harassing foreign action may be enjoined from prosecuting that action. In re Unterweser Reederei, GMBH, 428 F.2d 888, 890 (5th Cir. 1970), vacated and remanded on other grounds, 407 U.S. 1 (1972); Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542, 545 (7th Cir. 1960); Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105, 108 (2d Cir.), cert. denied, 345 U.S. 964 (1953). See also Western Electric Co. v. Milgo Electronic Corp., 450 F. Supp. 835, 836 (S.D. Fla. 1978); Velsicol Chemical Corp. v. Hooker Chemical Corp., 230 F. Supp. 998, 1017-18 (N.D. Ill. 1964); Gage v. Riverside Trust Co., 86 F. 984, 998-99 (Cir. Ct. S.D. Cal.

1898). Indeed, in O'Hare International Bank v. Lambert, 459 F.2d 328, 331 (10th Cir. 1972), cited by the Third Circuit in support of its opinion, the Tenth Circuit stated that

> The only justification for employment of injunctive power by a court in a case such as this is to prevent a misuse of litigation in the nature of vexatious and oppressive foreign suits.

The Third Circuit, however, reads the Supreme Court's decision in Donovan, supra, to establish the contrary rule that a finding of vexatiousness and harassment is immaterial. The court of appeals misconstrued Donovan, which merely held that a state court may not enjoin an in personam action brought in a federal court. This holding was premised on the fact that the right to litigate in federal court is granted by Congress and cannot be

taken away by a state. See General Atomic Co. v. Felter, 434 U.S. 12, 16 (1977). No issue of federal-state relations or grant of Congress is implicated in the case where a federal court issues an injunction concerning an action in a foreign nation, however, and Donovan is inapposite to an analysis of the present case.

The Third Circuit opinion states that the Donovan principle "has often been applied in cases similar to the present case where one of the actions is in a foreign jurisdiction." Infra, Appendix A at 19. The only case cited by the court for this proposition, however, is Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969). In Canadian Filters the foreign suit was brought three weeks after the

domestic suit, as compared with the more than three years taken by the respondents. More important is that the district court in Canadian Filters had issued an injunction prohibiting the parties from proceeding further in Canada without having passed upon its own jurisdiction over the Canadian patent, stating that it was reserving that issue until it had dealt with the United States patent. The patent involved in the suit enjoined, therefore, was separate and independent from the patent being litigated in the district court. Clearly, as articulated by the First Circuit, "layaway jurisdiction" is not a basis for enjoining a foreign proceeding based upon a separate subject matter. Id. at 579. In the instant case, the district court found that the subject

matter of the foreign action was duplicative of the action before it and that it possessed jurisdiction to determine all issues, with no matters "laid away." Canadian Filters, like Donovan, is inapposite.

The scope of Donovan requires clarification. Donovan establishes an absolute bar to state court injunctions restraining federal actions, and no subsequent case has relaxed that rule. However, Donovan has been applied before only to strike down injunctions issued in the United States by state courts against prosecution of suits in federal courts. It has never before been applied as the Third Circuit applies it here, to strike down a federal injunction against proceedings in a foreign court. This Court should issue the writ to determine whether

Donovan reaches across the seas, and, if not, whether a district court has the power to enjoin vexatious and harassing foreign suits, a power correctly recognized by other circuits but not by the Third Circuit.

If a district court may enjoin parties from pursuing a foreign action which it finds vexatious and harassing, no better opportunity for affirming such a rule could exist than the present case. The evidence before the district court that the respondents' foreign action was brought in bad faith to vex and harass was extensive. The district court found a duplication of issues between the two actions and considerable delay by the respondents, as cited by the Third Circuit, but it also had further evidence to support its finding of fact number 70,

infra, Appendix B at 32, that the foreign action was vexatious and harassing and commenced in bad faith.

The foreign action was brought to void the insurance contract on the ground of seven alleged material nondisclosures. See Appendix of record filed with the Third Circuit "App." at 358a - 359a. However, the lead excess insurance underwriter, who appeared in the district court to testify at the injunction hearing, admitted that he would not expect to be informed about five of those alleged "nondisclosures" and that the matters were not material. App. at 847a - 848a. In addition, he admitted that the respondents were aware of six of the seven "nondisclosures" by December 1975 (app. at 844a - 847a), and yet no assertion of "material nondisclosure" was made and the

insurance contract remained in effect. The respondents were also aware of the seventh "nondisclosure" as it was asserted in the Sixth Defense to the excess insurers' amended answer filed on February 17, 1976. App. at 61a. The barrister representing the respondents, who also appeared at the injunction hearing, testified that the English court would deem the respondents to have waived any right they might have had to rescind the insurance policy based on these "material nondisclosures." App. at 904a - 905a, 922a, 940a - 941a.

The district court had further sufficient reason to determine that the foreign action was brought in bad faith to vex and harass. Petitioner, in seeking and obtaining the injunction, asserted that the foreign action was a harassing

one. The respondents denied that assertion, and, in an attempt to refute it, noticed foreign depositions. The respondents noticed "the depositions of said defendants . . . by such of their officers, agents and servants as have knowledge or information pertaining to certain facts relative to the permanent injunction" sought by petitioner. App. at 371a. Thus, in order to demonstrate that the foreign action should not be enjoined, that is, to show that it was not brought in bad faith, to vex or to harass, the respondents took over twenty depositions of their own representatives. The respondents, however, have filed none of these depositions with the district court. A three-day injunction hearing was held in November, 1979 and not one sentence from any of these depositions was offered into

the record. Over a year after that hearing, and after an appeal of the injunction has been heard in the Third Circuit, transcripts of these depositions still remain unfiled with the district court.

The testimony that was presented at the injunction hearing demonstrates that the foreign action is a sham. The alleged "material nondisclosures" are not material at all, and any complaint the respondents may once have had has long since been waived. The respondents insisted upon exhaustive depositions to demonstrate the validity and non-vexatious nature of their foreign action, and these depositions ultimately proved to be just another element of harassment in the respondents' consistent and prolonged attempts to delay the trial of this

"unfortunate case" which "bears the scars of over five years of pre-trial skirmishing." Infra, Appendix A at 3.

Under such circumstances, where the district court's finding of bad faith is fully supported by the record, an injunction against the respondents, directing them to desist from further prosecution of the English action until termination of the American action, does not offend principles of comity. This Court should grant the writ in order to establish this point, to clarify the scope of Donovan, and to resolve the conflict among the circuits.

II.

The Third Circuit also reversed the district court and dismissed the complaint against three of the respondents

for lack of in personam jurisdiction. The Third Circuit made no holding that the district court abused its discretion in finding these respondents subject to its jurisdiction or that the district court's findings were clearly erroneous.

In footnote 9 of its opinion the court of appeals determined to pretermit the issue of the respondents' contacts with the forum state as being unnecessary to its consideration of the case.

> Because of the view we take, it is not necessary to consider the other arguments advanced by the insurers, nor is it necessary to meet the district court's alternative determination that, based on the evidence before it, the excess insurers' activities did in fact constitute doing business in Pennsylvania.

> We do not overlook the realty that CBG's contention that the excess insurers did do business in Pennsylvania was not fanciful.

Infra, Appendix A at 17. Nonetheless, without analyzing the contacts, the court of appeals directed the dismissal of the complaint as to three of the respondents because

> their contacts with Pennsylvania are simply inadequate to justify the exercise of personal jurisdiction . . . .

Infra, Appendix A at 18.

Based on evidence before it, the district court found that all of the respondents, including those three dismissed by the court of appeals, adopted the primary insurance policy, which was written in the forum state and was subject to the laws of that state. App. at 467a, 665a, 821a, 822a, 898a. The district court found that the binder evidencing

coverage was delivered in the forum state and payment for the coverage was made in the forum state. App. at 176a - 177a, 480a, 580a, 583a - 585a, 665a. It found that, by their own admission, all of the respondents derive at least one percent of their premium income from the forum state, that they provide coverage to citizens in the forum state, cover risks located in the forum state and provide coverage through brokers in the forum state. App. at 565a, 666a. The district court also found it to be a common practice for foreign insurers writing coverage in Pennsylvania to designate the Pennsylvania Insurance Commissioner as an agent for service of process and found that such a designation was an implied term of the excess insurance contract, binding all of the respondents. App. at

671a. A forum state broker gave evidence that he acted as agent in the forum state for all of the respondents in collecting the premiums. App. at 585a. Evidence was presented that the term "business interruption" and other features of the insurance contract put all of the respondents on fair notice that they were writing coverage for an American insured. App. at 591a - 592a, 594a - 597a.

These established facts, plus the sanctions entered by the district court and correctly upheld by the court of appeals, ended the question of in personam jurisdiction as to all respondents as of the close of the preliminary injunction hearing. During discovery after the sanctions were entered, petitioner developed information showing additional contacts which would support personal

jurisdiction over the respondents and specifically over one of the three respondents dismissed from the case. The information was not presented to the district court at the final injunction hearing because the issue of personal jurisdiction was previously closed, as the district court had ruled, through the imposition of sanctions. App. at 388a. Therefore, even if the court of appeals had some basis for dismissing the case against three of the respondents, and the record establishes to the contrary that the contacts enumerated completely satisfy the due process standards of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny, the most the court of appeals should have done was reverse the imposition of sanctions against the three companies and remand the case

to the district court for a separate determination as to jurisdiction over those parties. This Court should issue the writ to correct this departure from proper judicial procedure.

CONCLUSION

Because of the significant and unprecedented departure taken in the case by the Third Circuit from established law regarding the equity power of federal courts to enjoin vexatious and harassing foreign actions and its improper handling

of the in personam jurisdiction issue, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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Appendix

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

vs.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD.,

HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. and L'UNION ATLANTIQUE S.A. D'ASSURANCE, BRUSSELS, all being corporations,

Appellants

(D.C. Civil No. 75-1567)

Present: SEITZ, Chief Judge, and ALDISERT and GIBBONS,

Circuit Judges.

O R D E R

The petition for panel rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the

decision having asked for rehearing, the petition for rehearing before the original panel is denied.

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: July 7, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

v.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., MERCANTILE & GENERAL REINSURANCE CO., LTD., EAGLE STAR INSURANCE CO., LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO., LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO., LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. & L'UNION ATLANTIQUE S.A. D'ASSURANCES BRUSSELS, all being corporations

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD. and L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 75-1567)

Argued April 21, 1981

Before: SEITZ, *Chief Judge*,
and ALDISERT and GIBBONS, *Circuit Judges*.

(Filed June 10, 1981)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The question presented for review is whether the district court erred in enjoining the defendants from pursuing an action in England's High Court of Justice, Queens Bench Division, which sought to rescind excess insurance contracts covering business interruptions of a Delaware corporation doing business in an African country. A threshold inquiry requires us to decide if the district court had jurisdiction over the defendants. We conclude that the court properly exercised personal jurisdiction over eighteen of twenty-one insurance companies and reverse the grant of the injunction.

I.

This is an unfortunate case filed in the district court in 1975 which still admits of no resolution on the merits but bears the scars of over five years of pre-trial skir-

mishing.[1] The appellee, Compagnie des Bauxites de Guinea (CBG), a Delaware Corporation owned by Halco (Mining), Inc. (51%) and the Republic of Guinea (49%), mines and sells bauxite. CBG operates only in Guinea; it is not registered to do business in Pennsylvania and conducts no business in the United States.

Acting as an agent for CBG, Halco obtained insurance coverage through the Pittsburgh office of Marsh & McLennan, an insurance brokerage firm. The coverage insured against losses up to $20,000,000 from business interruptions caused by breakdowns at CBG's processing plant in Guinea. The Insurance Company of North America, not a party to this appeal, insured the first $10,000,000 of loss; the appellants, a group of twenty-one foreign insurance companies, provided excess coverage of $10,000,000 on contracts issued through a London broker.

As is customary in London, the lead underwriter circulated a "placing slip" among representatives of interested insurance companies indicating the risks to be covered and the total coverage requested. The representatives then initialed the placing slip, indicating the percentage of risk their companies were willing to assume. After the coverage was fully subscribed the London broker prepared a "cover note" listing briefly the details of the risk and the premium. An actual policy is seldom issued at this stage and none was issued here. Instead, the excess insurers adopted the form of the INA policy "as far as applicable." App. at 136a.

Because of damage to its bauxite crushing plant, CBG presented a claim on its insurance coverage and the insurers refused to pay. CBG filed a complaint in December, 1975, in the Western District of Pennsylva-

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1. The insurers have unsuccessfully appealed various aspects of the present case to this court on two previous occasions. No. 79-1511 (dismissed July 2, 1979) (motion to dismiss); No. 79-1513 (denied April 30, 1979)(stay of preliminary injunction).

nia against all the insurance companies, asserting jurisdiction based on diversity of citizenship. 28 U.S.C. §1332(a). Almost four years later, while still participating in the pre-trial stages of this case, the excess insurers filed suit in England on March 22, 1979, seeking to rescind the excess insurance contract alleging that CBG failed to disclose material facts relating to the contract. CBG then moved the district court to enjoin the carriers from pursuing the English suit on the ground that it raised issues identical to those in the case at bar. After a hearing, the district court granted the motion, providing the order that is the subject of this appeal under 28 U.S.C. §1292(a)(1).

II.

A district court must have personal jurisdiction over a party before it can enjoin its actions. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 112 (1969). The lack of jurisdiction is the initial question raised by the excess insurers.[2] The district court found personal jurisdiction under two independent theories. First, it held that the appellants' activities placed them within reach of the Pennsylvania long-arm statute 42 Pa. Cons. Stat. Ann. §§8301-8311 (repealed June 27, 1978; current version at 42 Cons. Stat. Ann. §5322). Alternatively, the district court took as established, pursuant to Fed. R. Civ. P. 37(b)(2)(A), that it had personal jurisdiction as a sanction for the insurers' failure to comply with the court's order compelling discovery. The rule provides that "[i]f a party . . . fails to obey an order to provide or

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2. Seventeen of the twenty-one insurers appeal from the finding of lack of in personam jurisdiction. App. at 81a. Eagle Star Insurance Co., Ltd., Hanover Insurance Co., Home Insurance Co., Ltd., and Turegum Insurance Co., Ltd. concede personal jurisdiction. All of the insurers appeal from the order granting the permanent injunction as well as the denial of the motion to dismiss for *forum non conveniens*.

permit discovery, . . . the court in which the action is pending may make . . . [a]n order that . . . designated facts shall be taken to be established for the purposes of the action. . . ."

A defendant's challenge to the court's in personam jurisdiction imposes on the plaintiff the burden of "com-[ing] forward with facts, by affidavit or otherwise, in support of personal jurisdiction." *DiCesare-Engler Productions, Inc. v. Mainman Ltd.*, 81 F.R.D. 703, 705 (W.D. Pa. 1979); *see also Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). CBG had the ultimate burden of proving that the activities of the insurance companies brought them within the scope of the Pennsylvania long-arm statute.

The long-arm statute sets forth two independent tests for the assertion of in personam jurisdiction over foreign corporations. A court may exercise jurisdiction over a foreign corporation found to be doing business in Pennsylvania as the statute defines doing business. Alternatively, the assertion of jurisdiction over a foreign corporation is permitted so long as that assertion does not contravene the due process clause prohibition against assertions of jurisdiction that "offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Myer*, 311 U.S. 457, 463 (1940)); *see generally World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Only minimal contacts with the forum state are required to satisfy due process. *See McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957); *Aldens, Inc. v. Packel*, 524 F.2d 38, 42-44 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

III.

CBG sought by means of discovery to obtain evidence to meet its burden of proving either that the insurers were doing business in Pennsylvania or that there

were sufficient contacts to satisfy due process. On August 9, 1976, it began what was to become a three-year discovery odyssey by serving a request on each defendant for copies of all business interruption insurance policies issued between January 1, 1972 and December 31, 1975, as well as all documents related in any way to the claim being made here. App. at 66a-69a. The carriers objected to the discovery request on January 24, 1977, claiming that compliance "would be extremely expensive and burdensome." *Id.* at 72a. CBG responded on May 12, 1977, by filing a motion to compel production. *Id.* at 74a. Over a year passed before the district court ruled on CBG's motion and ordered the excess insurers to produce the relevant documents. *Id.* at 515a-16a. During the interim, the insurance companies pressed their claim that the court did not have personal jurisdiction but did not relate that claim to the discovery order.

On May 20, 1977, seventeen of the twenty-one excess insurers filed a motion for summary judgment, contending that the complaint should be dismissed because the district court lacked personal jurisdiction over them. *Id.* at 78a-86a. According to the allegations of the motion and the supporting affidavits, none of these insurance companies was organized, licensed, or authorized to do business under the laws of Pennsylvania.[3] The excess insurers therefore concluded that the exercise of personal jurisdiction over them would constitute "a clear-cut violation of due process." *Id.* at 81a.

In an affidavit opposing the motion for summary judgment, CBG claimed that between 1971 and 1975,

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3. Two of the insurance companies questioning the district court's in personam jurisdiction, Excess Insurance Co., Ltd. and English & American Insurance Co., Ltd., are registered as surplus line carriers in Pennsylvania, Pa. Stat. Ann. tit. 40, §1006.6, and have designated agents for service of process, *id.* at §1006.8. They argue that these facts should not distinguish them from the other fifteen insurers. We do not find it necessary to address that argument.

various excess insurers had participated in at least ten insurance contracts connected with CBG's operations in Guinea wherein the insurers agreed to be subject to suit in the United States. *Id.* at 172a-73a. A second affidavit contains a more general list of the contracts involving CBG and each of the excess insurance companies in which the Pittsburgh office of Marsh & McLennan acted as CBG's agent. *Id.* at 177a.

Recognizing, however, that the full extent of the insurers' contacts with Pennsylvania could only be determined by examining the insurers' records, CBG renewed its request for the production of "all cover notes and/or insurance policies wherein any of the excess insurer defendants participated as an insurer . . . which . . . were delivered in . . . Pennsylvania and/or covered a risk located in . . . Pennsylvania." *Id.* at 194a. This request of July 14, 1978, narrowed CBG's earlier discovery request of August 9, 1976, to encompass only policies with some logical relationship to Pennsylvania. The excess insurers again objected on the ground that the request included documents beyond the legitimate scope of discovery and that the request was unduly burdensome and oppressive. *Id.* at 195a-96a.

On July 27, 1978, the district court attempted to resolve the motions for production of documents by ordering the insurance companies to "furnish the names of the policies and the numbers and sort of a general outline of the policies, not in detail, of all the [Pennsylvania related] policies they [had] written from 1971 to date." *Id.* at 516a; *see* Fed. R. Civ. P. 37(a). Counsel for the carriers argued that obtaining the policies was no simple task because the policies would be available only in the files of London brokers. To satisfy CBG's request, "over 150 London brokers" would have to search through "hundreds of thousands of documents." App. at 517a. The district court found, however, that the request was not burdensome and that the process could be expedited by contacting the brokers immediately through form let-

ters. *Id.* at 518a. The court granted the excess insurers' request for ninety days in which to comply with the order.

The insurers never questioned the district court's power to order production of their records. They recognized that the court had jurisdiction to determine whether it could properly exercise personal jurisdiction over them and therefore that it could compel discovery to aid in the resolution of that issue. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 n.5 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979); *In Re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1151 (N.D.Ill. 1979).

By October 25, 1978, the insurance companies were in violation of the order and asked for an additional thirty days to comply, representing to the court that "[c]ounsel has sought to secure the information necessary to answer plaintiff's interrogatories and *will probably be able* to complete the answers within thirty days from this date."[4] App. at 309a. (emphasis added). The court again granted their request. Although the excess insurers still had not produced any of the requested documents, the district court granted a final extension on December 21, 1978, giving the carriers until February 21, 1979, to comply with the discovery order. When granting the extension, the court warned the excess insurers that failure to produce the requested documents within this additional sixty days would result in the imposition of a sanction under Fed. R. Civ. P. 37(b)(2)(A) consisting of a finding of in personam jurisdiction. *Id.* at 542a.

At the close of the sixty day period, the excess insurers had produced only a few of the documents requested. The record indicates that no request that the English brokers forward the relevant policies was made until

4. In answering the insurers' motion for an extension, CBG noted that no interrogatories remained unanswered. App. at 316a. We agree, and assume that the excess insurers and the district court, in granting the motion, were referring to the order to produce documents.

January 1979. *Id.* at 337a. This modest attempt to comply with the court order was not begun until long after the ninety day period the excess insurers requested in July 1978, and at least two months after their counsel represented to the court in Pittsburgh that the material would be forthcoming within thirty days. These facts make it difficult to conclude that the excess carriers made a good faith effort to comply with the court's orders of July 27, 1978 and November 8, 1978. It is one thing not to produce discovery material on time; it is quite another thing not even to begin to produce it.

On April 19, 1979, the district court "impose[d] a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania." *Id.* at 667a; *see* Fed. R. Civ. P. 37(b)(2)(A). The sanction was carefully limited to the action before the court; only the facts necessary to exercise personal jurisdiction were taken as established. *See English v. 21st Phoenix Corp.*, 590 F.2d at 728.

One month earlier, the excess insurers had filed suit in the High Court of Justice in London seeking to rescind the underlying insurance contract with CBG, contending that CBG had misrepresented material facts concerning the subject matter of the coverage. CBG then moved that the district court enjoin the insurers from pursuing the English action, claiming that it involved the same issues as the present case and was filed merely to harass CBG. App. at 342a-45a. Concluding that the English suit was duplicative, the district court granted CBG's motion for a preliminary injunction, App. at 674a, and on August 5, 1980, permanently enjoined the insurers from pursuing the English action during the pendency of the present case. *Id.* at 476a-77a.

IV.

The insurers attempt to justify their failure to produce the requested documents, arguing that they complied with the discovery order of the district court by offering to make the documents available for inspection by CBG at their home offices in London and Brussels. We are not persuaded by this argument.

As a general principle, a trial court has discretion to order one party to produce its records for another party during discovery. Fed. R. Civ. P. 34; *see, e.g., Jacobs v. Kennedy Van Saun Mfg. & Eng. Co.*, 12 F.R.D. 523 (M.D.Pa. 1952). In certain situations, however, a court may force the requesting party to inspect the documents at the convenience of the party who possesses them. *Gielow v. Warner Bros. Pictures*, 26 F.Supp. 425, 426 (S.D.N.Y. 1938); *cf.* Fed. R. Civ. P. 33(c) (When the answer to an interrogatory is contained in business records, and the burden of ascertaining the answer is substantially the same for both parties, the respondent may answer by specifying the relevant records and allowing an opportunity to examine them.)[5] Generally, inspection is required when the requested material is so voluminous that copying and transporting it would prove unduly burdensome and oppressive, *Compagnie Continentale D'Importation v. Pacific Argentine Brazil Line*, 1 F.R.D. 388, 389 (S.D.N.Y. 1940), or where the distance between the parties is great. *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25 (D.C. Cir. 1947); *see also Lundberg v. Welles*, 93 F.Supp. 359 (S.D.N.Y. 1950); *Harris v. Sunset Oil Co.*, 2 F.R.D. 93 (W.D. Wash. 1941). Here, the district court specifically found that CBG's request for documents was not burdensome, App. at 516a, 518a, and it was likewise unimpressed by the excess insurers' complaints that they would have to

5. *See, e.g., Mid-American Facilities, Inc. v. Argonant Ins. Co.*, 78 F.R.D. 497 (E.D. Wisc. 1978); *Haykel v. G.F.L. Furniture Leasing Co.*, 76 F.R.D. 386 (N.D. Ga. 1976).

contact hundreds of London brokers. *Id.* at 517a. On the record before us, we cannot conclude that these findings were erroneous, and thus it was well within the trial judge's discretion to order that the necessary documents be brought to Pittsburgh for examination by CBG instead of requiring CBG to inspect the records at the home office of each of the twenty-one insurance companies.

Moreover, the excess insurers' offer to permit home office inspection was made quite late in the proceedings. They did not make the offer of home office inspection when they replied to the original request for the documents that was made on August 9, 1976, or during the July 27, 1978 hearing at which they requested an additional ninety days to comply, or when they asked for a thirty day extension on October 25, 1978, or when they received a sixty day extension on December 21, 1978. When they finally made the offer on November 24, 1978, it was neither included in any of the answering papers in the discovery proceeding nor was it made during any of the hearings. Instead the offer was tucked away in an affidavit filed by the insurers' New York counsel supporting the summary judgment motion. *Id.* at 312a. At the same time that the excess insurers' New York counsel was offering to permit inspection, their Pittsburgh counsel was promising the court that their clients would comply with the discovery order if only given more time. *Id.* at 309a. Indeed, the Pittsburgh counsel did not begin to rely on the offer for home inspection until June 1979, two months after the district court applied sanctions and issued the preliminary injunction.

Thus, in our view this is not the garden variety geographic conflict about whether the mountain should come to Mahomet or vice versa.[6] Rather, we perceive the appellants' offer to provide home office inspection as a defense strategy that simply comes too late in these un-

6. *See* F. Bacon, Essays: Of Boldness (1597).

duly protracted pre-trial proceedings to be of major significance in reviewing the imposition of sanctions by the district court.

V.

We will reverse a sanction imposed pursuant to Fed. R. Civ. P. 37 (b)(2) only if the district court abused its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam); *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 788 (3d Cir. 1974). Discretion as a jural concept admits of some lack of precision, and formal definitions of the concept are only the inception and not the fruition of understanding. We agree with Professor Dworkin that discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction.[7] At best, this means that legislative or judicial authority should provide guidance to both the exerciser and the reviewer by defining with some specificity the permissible outer limits of the exercise of discretion.

The Federal Rules of Civil Procedure offer some guidance regarding the limits on the district court's power to impose sanctions. Rule 37(b) specifies two limitations. It states that the district court "may make such orders in regard to the failure [to obey an order compelling discovery] as are just," and it lists specific sanctions that, "among others," are contemplated by the rule. The order before us here easily satisfies both limits of discretion specified by the rule. Case law instructs that the district court's decision must be rationally related to the reasons given and the requirements of the rule. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. We are aided here by the trial court's explanation of

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7. R. Dworkin, Taking Rights Seriously 31 (1977); *see generally United States v. Criden*, —— F.2d ——, ——, No. 80-2622 (3d Cir. April 20, 1981), slip op. at 7-11.

the factors that led to its decision.[8] An appellate court is not free to substitute its judgment for that of the trial court, because the rules have invested the court of first instance with the expression of that judgment. *See DiGregorio v. First Rediscount Corp.*, 506 F.2d at 788. The review function is not plenary; to disturb the exercise we must find an abuse of authority, not merely the presence of an alternative reasonable choice. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642.

8.

To show the full extent of the business done by the Excess Insurers connected with Pennsylvania, this Court, on July 27th, 1978, ordered the Excess Insurers to produce all insurance contracts which they had written since 1971 in which they provided coverage to Pennsylvania insureds, including Pennsylvania risks, or provided coverage through Pennsylvania brokers.

The Excess Insurers, through their attorneys, promised on several occasions to comply with this Court's order, and obtained extensions of time in order to comply. The Excess Insurers produced only a few of the insurance contracts requested and under the circumstances the Court feels that the Excess Insurers have not offered the necessary assistance to the various brokers in gathering documents and getting the requested information which would be necessary under the circumstances.

This Court, after some months of further delay, on December 21st, 1978, stated that if the Excess Insurers were to fail to produce the requested information within 60 days from that date, the insurance contracts, which were subject to its order of July 27, 1978, and showing the extent of the business contacts with Pennsylvania, that this Court would impose a sanction consisting of a finding that the Excess Insurers are subject to the in personam jurisdiction of this Court because of their business contacts in Pennsylvania. . . .

[T]he Court finds, as a fact, that the material promised this Court by the Excess Insurers on December 21st, 1978, and prior to that time on July 27th, 1978, . . . has not been forthcoming, and the Court, at this point, will rule and impose a sanction, and does find that the Excess Insurers are, in fact, subject to the in personam jurisdiction of this court.

Id. at 666a-668a.

On the record before us, we are persuaded that the trial court did not exceed appropriate limits of its authority. The excess insurers negligently or deliberately flouted the district court's order compelling discovery. For over six months after the order was first issued, the insurers represented to the court that they were attempting to comply with the order. But the insurers did not even attempt to implement the court's order until January 1979, several weeks after being warned that failure to comply would force the court to impose sanctions. The English brokers were given less than a month to gather the documents, and later indicated that given sufficient time they could have complied with the discovery order. App. at 1303a, 1308a-10a, 1330a. In addition, the insurers produced none of their own records consisting of indexes and placing slips. The district court imposed the sanction in response to the excess insurers' dilatory conduct in dealing with the court throughout the discovery proceedings. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 640, 643; *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (per curiam).

The excess insurers argue, however, that the district court could only enter the sanction of denying the motion to dismiss for lack of subject matter jurisdiction, but could not "[take] as established for the purposes of the action" that appellants had sufficient contacts with the forum state to justify its exercise of in personam jurisdiction. We reject this argument. The purpose and scope of the ordered discovery were directly related to the issue of jurisdiction and the rule 37 sanction was tailored to establish as admitted those jurisdictional facts that, because of the insurers' failure to comply with discovery orders, CBG was unable to adduce through discovery. This was an appropriate exercise of the district court's discretion. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979).

We recognize that in *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 49 U.S.L.W. 3856 (May 18, 1981), the Fifth Circuit's position appears to be to the contrary, but we find ourselves in disagreement with that case. As long as discovery orders are permissible in aid of the jurisdictional determination, we think it fairly follows that a district court may respond to noncompliance by the party resisting a finding of jurisdiction with an appropriate rule 37(b)(2)(A) sanction. The availability of such a sanction is particularly important when, as here, the very material sought to be discovered — the defendants' contacts with the forum state — will normally be in the possession of a defendant and will frequently be unknown to a plaintiff. The district court's decision to take as established for purposes of this action that the insurers had sufficient minimum contacts with Pennsylvania, in response to the insurers' failure to comply with discovery orders issued to determine the existence of such contacts, was an appropriate exercise of its discretion under rule 37(b)(2)(A).

Furthermore, there is no question of the insurers having been unfairly surprised by imposition of the sanction. The district court gave ample warning of the sanction it would impose. *See* App. at 542a; *see also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. at 642. Jurisdictional issues should not delay the proceedings before a court more than necessary, and personal jurisdiction in particular is best settled at the outset of litigation if the judicial system is to operate efficiently and without diluting the quality of justice. *See Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, 528 F.2d 911 (3d Cir. 1976) (per curiam). We conclude that the district court's order was a proper application of Rule 37(b)(2)(A) that the designated facts "shall be taken as established for the purposes of the action. . . ."

Having concluded that the court did not abuse its discretion under the rule, the only remaining limitation on imposition of sanctions is the due process clause of the Constitution. The sanction did not violate the fifth amendment due process rights of the excess insurers. As this court has observed, "[o]nly where the sanction invoked is more stern than reasonably necessary does a denial of due process result." *DiGregorio v. First Rediscount Corp.*, 506 F.2d at 789; *see generally Societe Internationale v. Rogers*, 357 U.S. 197, 209-11 (1958). Here, the sanction was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction.

Accordingly, we will not disturb the discretion exercised by the district court in determining that the excess insurers were subject to the personal jurisdiction of the court because their business contacts in Pennsylvania were deemed established as a sanction for failure to make discovery.[9]

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9. Because of the view we take, it is not necessary to consider the other arguments advanced by the insurers, nor is it necessary to meet the district court's alternative determination that, based on the evidence before it, the excess insurers' activities did in fact constitute doing business in Pennsylvania.

We do not overlook the reality that CBG's contention that the excess insurers did do business in Pennsylvania was not fanciful. By affidavit dated March 19, 1979, CBG presented 24 insurance policies and cover notes reflecting coverage written for CBG between 1972 and 1977, in which various excess insurers participated. App. at 2010-2500. The policies were delivered to CBG in Pittsburgh at the office of Halco (Mining) Inc. Eighteen of the policies and cover notes are dated prior to the filing of the law suit here. In these policies the insurers agree to be subject either to the jurisdiction of American courts or to arbitrate policy disputes here.

VI.

Three of the excess insurers, Chiyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels, complied with the discovery order by filing affidavits stating that they had issued no policies covering risks located in Pennsylvania or associated with either CBG or the Pittsburgh office of Marsh & McLennan. App. at 236a, 493a, 323a. The sanction imposed by the district court because of the other insurers' failure to produce the requested documents should not apply to these three companies. In addition their contacts with Pennsylvania are simply inadequate to justify the exercise of personal jurisdiction pursuant to the Pennsylvania long-arm statute. The record discloses no evidence that these companies deliberately availed themselves of the privilege of doing business within the state, or indeed that they had any contacts that would justify a reasonable expectation of being haled into court there. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

We therefore will reverse the district court's determination that it had personal jurisdiction over Chiyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels and direct dismissal of the complaint with respect to them.

VII.

We now turn to the order enjoining the excess insurers from maintaining the action commenced by them in London. The general principle established "[e]arly in our history," is that one court will not interfere with or try to restrain proceedings in another in an ordinary action in personam. *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).[10] "[W]here the judgment sought is

10. The principle applied here does not contradict the "first-filed rule" established in *Crosley Corp. v. Hazeltine Corp.*, 122

strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). This principle has often been applied in cases similar to the present case where one of the actions is in a foreign jurisdiction. *See Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969).

In *Donovan*, the Supreme Court applied this general principle notwithstanding the lower court finding that the second action was harassing and vexatious. *See* 377 U.S. at 415 (Harlan, J. dissenting). Thus, the district court's finding that the action instituted in the English courts was duplicative, and therefore harassing and vexatious, does not affect our decision. Likewise, there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself. *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849); *see also O'Hare International Bank v. Lambert*, 459 F.2d 329, 331 (10th Cir. 1972). Enjoining the parties necessarily affects the court and compromises "the comity which the federal courts owe to courts of other jurisdictions." *Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.*, 412 F.2d at 578.

F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). The first-filed rule provides that when similar cases have been filed in different federal district courts, "it [is] the duty of the court first obtaining jurisdiction to enjoin the prosecution of the subsequent proceedings in the other court." *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, 125 F.2d 1008, 1009 (3d Cir.), *cert. denied*, 316 U.S. 676 (1942); *see also Berkshire International Corp. v. Marquez*, 69 F.R.D. 583 (E.D.Pa. 1976). The rule has never been applied, and in fact it was never meant to apply where the two courts involved are not courts of the same sovereignty. *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d at 929. Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore "requires that such action be taken only with care and great restraint." *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

We do not determine that the district court lacks the power to enjoin parties from pursuing an action in another jurisdiction in every case. It is sufficient here to hold that the district court abused its discretion when it enjoined an action seeking a declaratory judgment in the courts of another sovereign. In the present case, duplication of issues and the insurers' delay in filing the London action were the sole bases for the district court's injunction, and we hold that these factors alone did not justify the breach of comity among the courts of separate sovereignties.

Accordingly, we will reverse the order granting a permanent injunction restraining the insurers from further prosecution of the suit instituted by them in England in the High Court of Justice, Queen's Bench Division.

VIII.

Finally we address the order denying appellants' motion to dismiss on the basis of *forum non conveniens*. "[D]enial of a motion to dismiss, even when the motion is based on jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). *See Fleming v. Berardi*, 441 F.2d 732 (3d Cir. 1971); *Commonwealth v. Brown*, 373 F.2d 771, 776 (3d Cir. 1967). Agreeing with Judge Maris, we believe that "little need be said"[11] and conclude that the order denying dismissal on the basis of *forum non conveniens* was inherently interlocutory since it did not terminate any phase of the litigation. Therefore, because it is not appealable under 28 U.S.C. §1291 as a final order and because no provision of 28 U.S.C. §1292 is applicable, we will dismiss the appeal on this issue for lack of jurisdiction.

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11. *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*, 506 F.2d 735, 742 (3d Cir. 1974).

IX.

For the reasons heretofore set forth, we will reverse the judgment of the district court issuing the injunction on August 5, 1980, and remand the cause for further proceedings in accordance with the foregoing.

GIBBONS, *Circuit Judge*, dissenting in part:

My difference with the majority is narrow. I join in part VI of the opinion of the court holding that there is no personal jurisdiction over Chioyoda Fire & Marine Insurance Co., Ltd., Vesta (UK) Ltd., and L'Union Atlantique S.A. D'Assurances, Brussels. I also join in part VII, reversing the injunction against prosecution of the suit instituted by the excess insurers in the High Court of Justice, Queens Bench Division.

Moreover, I agree that under the controlling case law in this circuit a denial of a motion to dismiss on *forum non conveniens* grounds is not ordinarily immediately reviewable. I disagree with the conclusion in Part VII of the opinion of the court that that rule is controlling here, however, for several reasons. First, it seems clear that the *forum non conveniens* contention bears directly upon the propriety of the issuance of an injunction against prosecution of a parallel suit in London, and thus may properly be considered in connection with the disposition of the appeal from that injunction. We review the court's decision to exercise in personam jurisdiction by virtue of 28 U.S.C. §1292(a)(1). I see no distinction between reviewing that decision, otherwise interlocutory and unreviewable, and reviewing the decision refusing to dismiss on *forum non conveniens* grounds. The facts bearing upon a determination of adjudication competence for purposes of the due process clause and those bearing upon whether or not the chosen forum is excessively inconvenient may not be identical, but they

certainly overlap to a large extent. Moreover both a decision to deny a Rule 12(b)(1) motion and a decision to deny a *forum non conveniens* motion would, if not reviewed at the outset, remain subject to review after final judgment. It makes no sense to me to leave this case in the posture in which one of two grounds which might after final hearing result in a dismissal is decided and the other left open. Even if this were an interstate rather than an international problem that result would be unsatisfactory, since it leaves open the possibility that a panel which later reviews the case may conclude that the trial should never have been held in Pennsylvania. In an international context the case for review now is even stronger, since even if a panel should later agree that Pennsylvania was a convenient forum, Great Britain need not afford that decision full faith and credit. Of course, had no injunction issued, neither ground for dismissal would be reviewed. But since 28 U.S.C. §1292(a)(1) permits review, we should consider and decide any ground which could be asserted against the propriety of injunctive relief. Certainly an injunction prohibiting trial in a more convenient forum would be error. Since, however, the majority has declined to review the *forum non conveniens* decision, and the record after final hearing on that issue may not be identical, it seems appropriate that I, too, decline at this time to express an opinion of its merits.

In Parts IV and V, the opinion of the court takes as established the jurisdictional facts supporting in personam jurisdiction, by virtue of a sanction imposed under Fed. R. Civ. P. 37(b). I disagree with the majority's conclusion that there was no abuse of discretion in imposing that sanction. The majority resorts to perogatives such as "defense strategy" to characterize defendants' offer to permit inspection of voluminous documents in London rather than in Pittsburgh, and finds fault with the timing of that offer. But that argument ignores the foreign excess insurers' initial pleading

that the Western District of Pennsylvania lacked personal jurisdiction to order them to do anything. Asserted from the outset, that position was never abandoned.

More significantly, the majority maintains the sanction was not an abuse of discretion because it "was carefully tailored to fit the situation; only the facts necessary to establish the minimum contacts needed to justify personal jurisdiction in this action were taken as established pursuant to the sanction." Slip op. at 15. *See also*, slip op. at 14. But the majority errs in characterizing the district court's exercise of personal jurisdiction as an example of minimum contacts, or specific, jurisdiction. The majority has "confounded specific jurisdiction to adjudicate claims linked to activities occurring or having an impact in the forum state, and general, 'all purpose' adjudicatory authority to hear and decide claims totally unconnected with the forum." *Donahue v. Far Eastern Air Transport Corp.*, —— F.2d —— (D.C. Cir. No. 80-1243, April 22, 1981, slip op. at 4). The district court exercised not specific, but general jurisdiction over the excess insurers. *See* App. 666-68. Specific and general jurisdiction analyses are quite distinct. *See generally* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966). The former inquiries into minimum contacts; the latter mandates not minimal, but continuous and substantial forum affiliation.

As the Supreme Court enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945), minimum contacts analysis applies to the "single or occasional acts" of a nonresident defendant within a state when the suit concerns those acts, but not when the suit concerns matters unrelated to the forum activities. Moreover, the Supreme Court has repeatedly emphasized that in order to sustain assertion of specific jurisdiction, the plaintiff must show that the nonresident defendant's single or occasional acts within the forum state

which gave rise to the claim manifest defendant's "purposefully availing itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Shaffer v. Heitner*, 433 U.S. 286 (1977); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). Plaintiff's unilateral act within the forum state is insufficient to confer personal jurisdiction over the nonresident defendant. Similarly, defendant's fleeting or fortuitous forum connection lacks the requisite element of intentional invocation of the forum's benefits. Examination of the relevant transactions in this case reveals that the only contact the excess insurers had with Pennsylvania concerning this claim is too attentuated to meet the requirements of *Hanson v. Denckla* and its progeny. That contact amounts to a phone call placed by CBG's parent corporation's broker from Pittsburgh to Bland, Welsch in London requesting the London firm to secure agreements with foreign insurers in London to cover an African risk.

As a general rule, mere placing of a phone call by defendant into the forum state does not constitute "purposeful availing." *See, e.g., Covington Industries Inc. v. Resinex, Inc.*, 629 F.2d 730 (2d Cir. 1980) (defendant's telexes to Georgia from Switzerland concerning delivery of goods to Haiti do not constitute "transacting business" under the liberally interpreted Georgia long-arm statute); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (use of the telephone does not constitute purposeful activity under the fourteenth amendment due process clause); *Aaron Ferer & Sons Inc. v. Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977) (defendant's phone call to Nebraska from Michigan concerning a Michigan contract does not constitute purposeful activity in Nebraska); *Northeast Timber Inc. v. Pines Trailer Corp.*, 501 F. Supp. 321 (E.D. Pa. 1980) (defendant's phone calls to Pennsylvania from Illinois do not consti-

tute purposeful activity in Pennsylvania). It follows all the more forcefully that *plaintiff's* or plaintiff's agent's phone call *from* the forum state concerning an out-of-state transaction does not draw defendant into invoking the forum state's benefits. *See, e.g., McBreen v. Beech Aircraft Co.*, 543 F.2d 26 (7th Cir. 1976) (out-of-state defendant's remarks in interstate phone call placed by plaintiff from the forum state do not constitute purposeful activity by defendant in the forum state); *Galaxy International, Inc. v. White Stores Inc.*, 88 F.R.D. 311 (W.D. Pa. 1980) (Pennsylvania company's phone call from Pennsylvania to defendant in Tennessee resulting in a contract to purchase beef from outside Pennsylvania is not purposeful activity in Pennsylvania).

Hence, given the undisputed facts bearing on specific jurisdiction, assertion of such jurisdiction based on the excess insurers' alleged minimum contacts with Pennsylvania would have been inappropriate. *International Shoe*, however, delineated another category in which assertion of personal jurisdiction over a nonresident defendant may be permissable. This is the general, or "all purpose" jurisdiction classification. It applies to claims *unrelated* to the forum, when the nonresident's contacts are "continuous" and "substantial."

> While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

326 U.S. at 318 (citations omitted).[1] *Bork v. Mills*, 458 Pa. 228, 231-32, 329 A.2d 247, 249 (1974); *Whalen v. Walt Disney World*, 418 A.2d 389, 391-92 (Pa. Super. 1980). *See also* Restatement 2d of Conflicts §47(2).

In order to maintain personal jurisdiction over the excess insurers, then, CBG must show that all the foreign excess insurers engaged in continuous and substantial business in Pennsylvania. In imposing personal jurisdiction by Rule 37 sanction, the district court therefore took as established not isolated contacts supporting the exercise of specific jurisdiction, but major "continuous corporate operations" in Pennsylvania by each excess insurer. By their nature, the facts requisite to asserting general jurisdiction cannot be "carefully tailored"; they must be extensive and pervasive.[2] The

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1. The Supreme Court has only once, since *International Shoe*, upheld the exercise of this category of personal jurisdiction. That decision, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), was something of an anomaly. The forum most connected with the defendant and with the disputed transaction was not Ohio, where plaintiff brought suit, but the Philippines, which at the time were under Japanese occupation. At the time, Ohio was the most related American forum. *Perkins* is arguably a jurisdiction by necessity decision. *See* Von Mehren & Trautman, *supra*, 79 Harv. L. Rev. at 1144 ("the *Perkins* decision should be regarded as a decision on exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction"). Von Mehren and Trautman argue that, "aside perhaps from the possibility of *limited* general jurisdiction based on the location of assets," specific jurisdiction should wholly supplant general jurisdiction. *Id.* (Emphasis in original).

2. Pennsylvania decisions elaborating the "continuous and substantial" standard indicate a very high threshold of business activity. *See, e.g., Bork v. Mills, supra* (uncontroverted) allegation that defendant hauled freight within Pennsylvania insufficient to meet continuous and substantial test), *compare* Scanapico v. Richmond, Fredricksburg & Potomac R. Co., 439 F.2d 17 (2d Cir. 1970) (en banc) (freight solicitation in forum by two employees, sale of tickets, and daily presence in forum of defendant's freight cars on trains operated by other carriers meets "doing business" test under New York service of process statute); Lebkuecher v. Loquasto, 255 Pa.

facts before the district court indicated that some of the excess insurers had entered into other contracts in which they agreed to be subject to suit in Pennsylvania or other United States aljurisdictions. Standing alone, these contracts do not satisfy the continuous and substantial forum affiliation test.[3] In order to assert general jurisdiction, the district court was obliged to assume that these contracts were but a small part of a persistent pattern of sizeable business dealings with Pennsylvania insureds, or covering Pennsylvania risks. The necessarily broad scope of the jurisdictional facts the district court assumed, over defendants' denial, and without placing the burden of discovery on plaintiff, was an abuse of discretion.

I do not advance the proposition that a Rule 37 sanction may never be employed to facilitate discovery of facts bearing upon the exercise of personal jurisdiction.

Super. 392, 389 A.2d 143 (1978) (possessing a license to practice medicine in Pennsylvania and maintaining a classified listing in a Pennsylvania telephone directory do not constitute continuous and substantial business activities); *Whalen v. Walt Disney World*, *supra* (purchase of $1,551,725 in merchandise from a company located in Pennsylvania, and purchase of liability insurance from a company incorporated in Pennsylvania do not meet continuous and substantial test); Garfield v. Homowack Lodge, Inc., 249 Pa. Super. 392, 378 A.2d 351 (1977) (weekly advertising in Philadelphia newspaper over five year period at cost of $2,000 per year, toll-free phone number to enable Philadelphia residents to make reservations at New York resort, and payment of 10% referral fee to Philadelphia travel agents constitute continuous and substantial business activity).

3. *See* cases cited *supra* note 2. *Cf.* Bernardi Bros. v. Pride Mfg. Co., 427 F.2d 297 (3d Cir. 1970) (when claim unrelated to New Jersey, and defendant's sole contact with New Jersey was a nonexclusive agent residing in that forum, no basis for assertion of personal jurisdiction); DiCesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703 (W.D. Pa. 1979) (rock star's occasional performances in Pennsylvania do not justify asserting personal jurisdiction over him in Pennsylvania when claim arose out of breach of contract to perform a concert in Ohio).

Nonetheless, the imposition of burdens of production in a distant place is one of the core elements of unfairness which the due process cases from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) through *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) address. It is small comfort to a defendant objecting to the imposition of that burden that it is being imposed only for the purpose of determining whether or not the court has authority to impose it. A proper accommodation between plaintiff's interest in a choice of a forum and defendants' due process protection against imposition of unfair burdens of production, it seems to me, requires that once a foreign defendant makes a *prima facie* showing both of absence of minimum contacts relating to the claim, and of absence of continuous and substantial forum presence, the plaintiff should have to do the initial traveling. *Cf. River Plate Corp. v. Forestal Land, Timber & Ry. Corp.*, 185 F.Supp. 832 (S.D.N.Y. 1960) (court's power to order compliance with discovery requests when it is unclear that the court has jurisdictional power over the defendant must be carefully circumscribed). Thus I would hold that the trial court abused its discretion in imposing the sanction of finding the jurisdictional facts against the defendant, at least until the court first ordered inspection of the relevant documents by the plaintiff at defendants' home base.

Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3856 (May 19, 1981), may possibly be read as prohibiting use of a Rule 37 sanction until such time as the plaintiff has fully met its burden of establishing personal jurisdiction. Were it so intended, I would not follow it that far. Defendant's refusal to permit inspection of documents at its home base at plaintiff's expense initially might support the imposition of the sanction imposed in this case. Such a refusal would effectively preclude the plaintiff from meeting its burden of establishing the jurisdictional facts. *Cf. Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10

(4th Cir. 1971) (dictum).[4] But it seems to me that an accommodation between the defendant's due process interests and the plaintiff's choice of a forum requires a more flexible interpretation of Rule 37 than the majority announces.[5] That is particularly the case when, as here, the record discloses no basis for the exercise of specific jurisdiction based on purposeful Pennsylvania contacts with the transaction sued on, and the attempted discovery is aimed at establishing a general corporate presence in that state. The far reaching inquiry into the establishment of general jurisdiction could impose costs and burdens far in excess of whatever premiums defendants de-

4. Even this basis for assertion of personal jurisdiction via discovery sanction is problematic, however. In effect, the district court would by relying on Rule 37 to *create* personal jurisdiction. This use of Rule 37 may well be inconsistent with Rule 82, which provides that the Federal Rules of Civil Procedure "shall not be construed to extend . . . the jurisdiction of the United States district courts. . .". Exercise of personal jurisdiction pursuant to a state long-arm statute involves both a fairness and a power analysis. *See, e.g., World Wide Volkswagen, supra*. It may not be unfair to subject the excess insurers to suit in Pennsylvania. They have certainly had notice and an opportunity to be heard. Fairness, however, is not all. The district court must also have some power over these defendants. On the facts available to the district court, it lacked that power. It is questionable whether a district court may concoct adjudicatory authority by virtue of defendant's flaunting the court's apparent lack of power. However frustrating defendant's recalcitrance, it does not imply, any more than does these defendants' partial compliance, that defendant in fact has maintained forum affiliations sufficient to justify assertion of either specific or general jurisdiction.

5. The majority's reliance on English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), *cert. denied*, 444 U.S. 823 (1979), is misplaced. Although the Eighth Circuit affirmed the district court's assertion of personal jurisdiction as a Rule 37 sanction, the appellate court also observed that the nonresident corporation maintained sufficient forum affiliation to justify assertion of jurisdiction in any event. 590 F.2d at 728 n.6. Moreover, defendant's conduct in that case involved refusal adequately to answer, at its home base, written interrogatories. There was no burden of production at a distant place.

rived from their prior forum activities. The record in this case establishes that many thousands of files would have to be examined to satisfy the plaintiff's inquiries. The burden of such an examination should have been placed initially on the plaintiff before sanctions were considered.[6] I would hold, therefore, that the trial court abused its discretion in imposing the Rule 37 sanction of finding the jurisdictional facts against those defendants left in the case. On the record, aside from the Rule 37 order, defendants maintain insufficient Pennsylvania connections to sustain either specific or general jurisdiction over them. I would reverse with a direction to grant their motion to dismiss.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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6. Although defendants initially indicated they would comply with the district court's order to inspect and produce their documents in Pittsburgh, and subsequently and belatedly complied only partially, the district court entered the sanction to penalize not defendants' delay, but their insufficient compliance.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2416

COMPAGNIE DES BAUXITES DE GUINEA

v.

INSURANCE COMPANY OF NORTH AMERICA, et al.
Appellants

(D.C. Civil No. 75-1567)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 21, 1981

Before: SEITZ, *Chief Judge* and ALDISERT and GIBBONS, *Circuit Judges*

(Filed June 10, 1981)

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Page 22

In line 7 of the first full paragraph, "perog .tives" is replaced by "pejoratives"

Page 23

In line 22 of the first full paragraph, "inquiries" is replaced by "inquires"

Page 26

In the third line of footnote 2, eliminate the parenthesis following the word "uncontroverted"

Page 27

In the fourth line, the word "aljurisdictions" is eliminated and replaced by "jurisdictions"

JOHN J. GIBBONS
Circuit Judge

DATED: June 16, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 75-1567
August 5, 1980

COMPAGNIE DES BAUXITES DE GUINEE, corporation,

Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA, THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO., LTD.,HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO., LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOYKO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICA INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS, all being corporations,

Defendants.

PRELIMINARY STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IN RE PERMANENT INJUNCTION

I. Preliminary Statement

The issue addressed herein is whether this Court should issue a permanent injunction against the excess insurer defendants prohibiting them from continuing to prosecute the duplicative action which they have filed against the plaintiff in England.

II. Findings of Fact In Re Permanent Injunction

A. The parties and others involved

1. Plaintiff, Compagnie des Bauxites de Guinee, hereinafter abbreviated "CBG", is a Delaware Corporation.

2. CBG is owned 49% by the Republic of Guinea and 51% by Halco (Mining) Inc., hereinafter abbreviated "Halco", a

Delaware Corporation, which is licensed to do business in Pennsylvania, and which has its offices at Two Allegheny Center, Pittsburgh, Pennsylvania.

3. Plaintiff has entered into contracts with Halco whereby Halco has performed certain administrative services for plaintiff, including the procurement of insurance, from its office in Pittsburgh.

4. Plaintiff's principal place of business is in the Republic of Guinea, West Africa.

5. Plaintiff is not licensed to do business in the Commonwealth of Pennsylvania.

6. Plaintiff maintains no place of business in the Commonwealth of Pennsylvania.

7. Plaintiff maintains no place of business anywhere in the United States of America.

8. Plaintiff does not do any business in Pennsylvania or elsewhere in the United States.

9. Plaintiff does not maintain any place of business nor do any business in England.

10. Defendant, Insurance Company of North America, hereinafter abbreviated "INA", is a Pennsylvania corporation having its principal place of business in Philadelphia.

11. The defendants other than INA are twenty insurance companies which write insurance in the London market and one insurance company, L'Union Atlantique S.A. d'Assurances, hereinafter abbreviated "UNAT", which writes insurance in Brussels.

Said twenty-one defendants will be referred to as "the excess insurer defendants".

12. The excess insurer defendants are incorporated in the following countries:

Defendant	Country of Incorporation
The Insurance Corporation of Ireland Ltd.	Ireland
Eagle Star Insurance Co. Ltd.	England
Hanover Insurance Company	New Hampshire, U.S.A.
Continental Assurance Company of London Ltd.	England
The Century Insurance Co. Ltd.	Scotland
Yuval, The Insurance Company of Israel Ltd.	Israel
Home Insurance Company (doing business in England as Home Insurance Co. Ltd.)	New Hampshire, U.S.A.

Defendant	Country of Incorporation
Slater Walker Insurance Co. Ltd.	England
Yasuda Fire & Marine Insurance Co. (UK) Ltd.	England
Nichido Fire & Marine Insurance Co. Ltd.	Japan
Turegum Insurance Company	Switzerland
Sahar Insurance Co. Ltd.	Israel
Excess Insurance Co. Ltd.	England
Trident Insurance Co. Ltd.	England
Vesta (UK) Ltd.	England
Chiyoda Fire & Marine Insurance Co. Ltd., Toyko	Japan
Stronghold Insurance Co. Ltd.	England
British Reserve Insurance Co. Ltd.	England

Defendant	Country of Incorporation
English & American Insurance Co. Ltd.	England
Consolidated Europen Reinsurance Co. Ltd.	England
L'Union Atlantique S.A. d'Assurances, Brussels	Belgium

13. None of the excess insurer defendants has maintained an office in Pennsylvania.

14. None of the excess insurer defendants has been licensed to do business in Pennsylvania except the following:

Eagle Star Insurance Co. Ltd.	licensed in Pa. until 1978
Hanover Insurance Co.	licensed in Pa.
Home Insurance Co.	licensed in Pa.

Turegum Insurance Company	licensed in Pa. for surplus lines only
Excess Insurance Company	licensed in Pa. for surplus lines only
English & American Insurance Co. Ltd.	licensed in Pa. for surplus lines only

15. In addition to the twenty-one excess insurer defendants named in finding No. 12, Mercantile & General Reinsurance Co., Ltd., hereinafter abbreviated "Mercantile & General", a corporation incorporated in England and engaged in the insurance business in the London market, was named as a defendant.

16. At some time in 1976, prior to October 26, defendant, The Insurance Corporation of Ireland Ltd., hereinafter abbreviated "ICI", assumed the obligations

of Mercantile & General with respect to the excess insurance involved in this action.

17. On October 26, 1976, defendant Mercantile & General was removed from this action and the caption was amended to delete its name.

18. Marsh & McLennan, Inc., hereinafter abbreviated "Marsh & McLennan", has been and is an insurance brokerage concern having offices in Pittsburgh, New York and elsewhere.

19. Bland Payne Company, formerly named Bland Welch & Co. Ltd., hereinafter abbreviated "Bland Payne", has been and is an insurance brokerage concern incorporated in England and engaged in the insurance brokerage business in the London market. It is a Lloyds broker.

B. Events

(a) The Property

20. Prior to 1973, Plaintiff developed and caused to be constructed a mine, railway and processing plant in the Republic of Guinea, West Africa, for the mining, transporting, processing and exporting of bauxite ore. Some of the facilities, in particular, the railway and the port were developed and caused to be constructed by L'Office d'Amenagememt de Boke, hereinafter abbreviated "OFAB". This project has been referred to as "The Boke Project".

21. The property in Guinea related to the present action consisted of a bauxite mine at Sangaredi, a railway from Sangaredi to Kamsar, and a processing plant and loading wharves at Kamsar.

22. Plaintiff has been granted certain mining rights by the Government of Guinea to extract bauxite ore in a specified area of Sangaredi. Plaintiff has owned the facilities at Kamsar which crush, dry and store bauxite and which load bauxite into ships. These facilities are hereinafter termed "the processing plant". OFAB has owned the loading wharves at Kamsar.

23. Commercial operations at the Boke project were begun in 1973, although some of the facilities were in operation before that year.

(b) The Insurance

24. In July or August of 1973, Halco, acting on behalf of Plaintiff, instructed Marsh & McLennan to obtain for Plaintiff business interruption insurance covering its operations in Guinea.

25. The amount of such business interruption insurance ultimately requested was $20,000,000.

26. Marsh & McLennan, acting on behalf of plaintiff, requested Bland Payne to obtain business interruption insurance for plaintiff in the London market.

27. In late January and in February, 1974, Bland Payne presented to the excess insurer defendants except for UNAT and to Mercantile & General a placing slip in in the amount of $10,000,000, in excess of tne first $10,000,000. Said excess insurer defendants (except for UNAT) and Mercantile & General initialed said placing slip, effective February 12, 1974, indicating the part of said $10,000,000 each was willing to insure. A copy of

said placing slip, without all the signatures, has been marked defendants' Exhibit "1a".

28. Effective February 12, 1974, UNAT initialed a placing slip sent to it by Bland Payne and returned it to Bland Payne. A copy of said placing slip has been marked defendants' Exhibit "1b".

29. On April 10, 1974, Bland Payne issued in London, and sent to Marsh & McLennan in Pittsburgh, Bland Payne's cover note, and Marsh & McLennan duly delivered said cover note to Halco. A copy of said cover note is attached to Exhibit "2" to the Complaint in the present action.

30. Said cover note recited that Bland Payne had effected business interruption insurance for plaintiff in the amount of $10,000.000, in excess of

$10,000,000 with insurance companies listed on an attachment to the cover note. Said attachment listed the excess insurer defendants and Mercantile & General and specified the percentage of the excess $10,000,000 which each of them had agreed to insure.

C. The American Action

(a) The Pleading and Motions

31. On December 11, 1975, plaintiff filed the present action in two counts, the first against INA on its business interruption insurance Policy No. 71 HF1195 (finding No. 24 supra), and the second against the excess insurer defendants and Mercantile & General on Bland Payne's cover note (finding No. 30 supra), alleging losses to plaintiff from interruption to its business, reducing its output of Bauxite, as the result of

failures sustained by the pan feeders and crusherhouse at plaintiff's processing plant at Kamsar during 1974, subsequent to February 12, 1974.

32. Service was made upon the insurance commissioner of the Commonwealth of Pennsylvania, who sent copies of the summons and complaint by certified mail to the Excess Insurer defendants in London and Brussels.

33. In this action CBG alleges that INA and the Excess Insurers agreed to provide all risk business interruption insurance coverage to CBG for certain facilities in Guinea up to $20,000,000 for each loss, that the first $10,000,000 of coverage was written by INA, and the excess layer of $10,000,000 of coverage was written by the Excess Insurers, that while this insurance was in effect in

1974, an incident occurred involving the crusherhouse or the tippler/crusher building which led to a business interruption loss in excess of $10,000,000, and that the loss was covered by the insurance but the defendants have refused to indemnify CBG in accordance with the insurance contract.

34. The said INA policy involved in this action is Policy No. 71HF1195, effective as of February 12, 1974, covering certain business interruption losses suffered by CBG up to $10,000,000 for each loss. The INA policy was issued in Philadelphia and was delivered to CBG in Pittsburgh.

35. The Excess Insurers did not issue or execute a policy of their own, but they did execute a placing slip in which they agreed to provide coverage on

the same terms and conditions as the underlying INA policy, except that their coverage would be for each loss of $10,000,000, in excess of the underlying $10,000,000 covered by INA.

36. In their Answer filed December 31, 1975, and Amended Answer filed February 17, 1976, the Excess Insurer defendants raised among others the following defenses:

a) Notice of loss was not given, and sworn proof of loss was not submitted within the time required.

b) The alleged loss was not covered by the insurance underwritten.

c) Suit was not filed within the time required.

d) The Court lacks jurisdiction of the subject matter of the action.

e) The Court lacks jurisdiction over the Excess Insurer defendants.

f) The primary damages to the pan feeders and crusher house occurred before the effective date of the insurance and the alleged loss is therefore not covered.

g) The prior damage to the property in question was not revealed by plaintiff to the Excess Insurer defendants prior to or at the placing of the coverage, which serves to eliminate coverage for the loss.

h) The alleged damage to the pan feeders and crusher house was expressly excluded from the coverage.

37. The Excess Insurers filed an Amended Answer on February 17, 1976. In the Amended Answer they challenged

this Court's in personam jurisdiction and venue, and they defended themselves on the merits.

38. Among the defenses raised by the Excess Insurers in their Amended Answer was also the defense of nondisclosure. In paragraph 28 of the Amended Answer, the Excess Insurers aver that "prior damage to the property in question was not revealed by the plaintiff to the defendants prior to or at the time of the issuance of the said Policy No. 71HF1195 and cover note, all of which is contrary to the terms, conditions and provisions of the said policy and cover note and all of which serves to eliminate coverage for the alleged loss."

39. On May 20, 1977, the Excess Insurers filed a Motion for Summary Judgment with supporting affidavits. In

that Motion seventeen of the twenty-one Excess Insurers alleged a lack of in personam jurisdiction and all twenty-one sought dismissal on the ground of forum non conveniens. After receiving further affidavits and briefs and after receiving evidence and hearing oral argument, the Court denied the Motion for Summary Judgment on April 19, 1979, and confirmed its ruling in an Order dated June 25, 1979.

40. On January 29, 1979, the Excess Insurers filed a second Motion for Summary Judgment. In that Motion the Excess Insurers challenged the Court's subject matter jurisdiction by alleging a lack of diversity between CBG and INA. INA did not join in the Motion. The Court denied this second Motion for Summary Judgment on April 19, 1979, and confirmed its ruling in an Order dated June 25, 1979.

(b) Plaintiff's Discovery on Personal Jurisdiction over Excess Insurer Defendants.

41. On August 9, 1976, plaintiff served, and on November 19, filed, its first request for documents to each defendant calling in paragraph 7 for, inter alia, "copies of all business interruption insurance policies issued by defendant during the period from January 1, 1972 to December 31, 1975."

42. After the Excess Insurer defendants had on January 24, 1977, objected to producing such policies on grounds of burdensomeness, plaintiff on May 12, 1977, filed a Motion to Compel their production.

43. On June 15, 1978, the Court orally overruled the Excess Insurer defendant's objections and limited other requests to an extent not material to the present controversy.

44. On July 14, 1978, plaintiff served and filed a second request for production of documents by the Excess Insurer defendants seeking "all cover notes and/or insurance policies wherein the Excess Insurer defendants participated as an insurer . . . which . . . were delivered in . . . Pennsylvania . . . or covered a risk located . . . in Pennsylvania." This second request thus asked for part of the documents covered by the first request (finding No. 41 supra), which the excess insurer defendants were already required to produce (finding No. 43, supra).

45. After the Excess Insurer defendants had on July 17, 1978, objected to plaintiff's second request for documents on the ground, inter alia, that they were not in said defendants' possession,

custody or control, but were in plaintiff's possession, custody and control. The Court on July 27, 1978, heard argument, and, on being told that the policies were kept by the brokers in London, ordered the Excess Insurer defendants to request them from the brokers. The Court limited them to the period from 1971 to date.

46. On November 24, 1978, the Excess Insurer Defendants served and filed an affidavit offering to make their records, alleged to require review of approximately 4,000,000 files, available at their offices in London for inspection by plaintiff.

47. On November 27, 1978, plaintiff served and filed a Motion to Compel the Excess Insurer defendants to produce the documents relating to their Pennsylvania business since 1971.

48. On December 21, 1978, the Court held a status conference and, after hearing argument, gave the Excess Insurer defendants an additional sixty (60) days to produce the insurance policies which were in the possession of the brokers in London, stating that the Court would assume that he had jurisdiction over defendants unless they produced "statistics and other information in that regard that would indicate otherwise."

49. On February 20, 1979, the Excess Insurer defendants filed copies of their letters to the London brokers asking for the information concerning insurance business written for risks or insureds in Pennsylvania or emanating from Pennsylvania brokers, and copies of the brokers'

answers, most of which state that they cannot extract from their voluminous files the documents requested.

50. On February 23, 1979, plaintiff filed a Motion for an Order denying the Excess Insurer Defendants' Motion to Dismiss for lack of personal jurisdiction over them.

(c) Other Discovery

51. Beginning February 28, 1978, counsel for plaintiff and counsel for defendant INA took a number of depositions of witnesses in Pittsburgh, New York, London and Brussels.

52. Counsel for the Excess Insurer Defendants appeared at said depositions pursuant to orders of court entered February 17, and July 16, 1978, providing that by so doing they did not waive their objections to the jurisdiction of

the court or other grounds for dismissal made in their Motion filed May 20, 1977.

53. On November 20 and 21, 1978, counsel for INA took the deposition of Leonard Jacob, Jr., who had been resident manager for plaintiff in Guinea from 1971 until at least 1977.

54. Mr. Jacob testified that problems developed in the pan feeder system and tippler/crusher system in 1973, well before February 12, 1974, the effective date of the business interruption insurance at issue in the present action.

D. The English Action

55. On March 22, 1979, over three years after this subject action was commenced, the Excess Insurers commenced suit against CBG in the High Court of Justice, Queen's Bench Division, at 1979 I No. 1727. In that suit they seek a

declaration that they are entitled to avoid the contract of insurance with CBG and Order that the contract of insurance is avoided on the ground of material nondisclosure.

56. In the statement of claim filed in the English action, the Excess Insurers allege that prior to the underwriting they were not told facts which would have shown that the underwriters would be subject to suit in the United States and that they were not told that "from about the beginning of October, 1973, serious problems had developed in the tippler/crusher system at Kamsar which were substantially affecting production."

57. Since at least December 1975, the Excess Insurers have known the facts which they allege in the English action to

have been undisclosed prior to the underwriting. The basis for United States jurisdiction over them is asserted in the Complaint. Their Amended Answer shows their awareness of alleged problems with the tippler/crusher system. Nonetheless, they delayed until March 22, 1979, to file the English action which is based upon their allegedly recent discovery of these facts.

58. CGB does not trade or reside within the jurisdiction of English courts. The Excess Insurers do not allege that CBG derives profits out of England. Nonetheless, the English court authorized the Excess Insurers to serve CBG with process at its statutory office in Dover, Delaware.

E. Duplication in the Two Suits

59. The English action duplicates the American action in that it involves the same parties as Count II of the present case.

60. The English action involves the same insurance contract as that involved in the American action.

61. The English action involves the same subject matter as that involved in the American action.

62. The Excess Insurers take the position in both the English action and the American action that the insurance contract is unenforceable against them because of alleged nondisclosures.

63. In the English action the Excess Insurers seek a "declaration that they are entitled to avoid the Contract of Insurance"; in the American action the

Excess Insurers defend on the ground that coverage is "eliminated" because alleged facts were not revealed.

64. The same proof would be required in both the English action and the American action. The Excess Insurers, in both actions, would have to prove that prior to the underwriting certain incidents occurred in Guinea, that those incidents were material to the underwriters, and that they were not told and had no reason to know of the incidents. CBG, in both actions, might present evidence to the contrary on all of these points.

65. The English action, filed on March 22, 1979, duplicates the present action which has been pending in this Court since December 11, 1975.

66. It would be vexatious and harassing to CBG to be forced to litigate regarding the same subject matters in two forums.

67. Further prosecution of the English action would result in economic waste and irreparable injury to CGB.

68. In the English action the case would not be heard by a jury, whereas the Ameican action involves a jury trial, which was initially sought by CBG.

69. In the English action, the Court is asked to deal only with the issue of nondisclosure, which is one of the issues before this Court in the American action. INA is not a party to the English action. The English Court does not have before it all of the parties, claims and defenses which make up the entire controversy among the parties, as shown by the pleadings and

discovery in the American action. Therefore, the complete dispute can be considered and disposed of only in the present case before this Court, not in the English action.

70. The English action represents an attempt by the Excess Insurers to subvert and avoid this Court's jurisdiction, to vex and harass CBG, to deny CBG its rights under the Constitution of the United States, to cause CBG irreparable injury and to have their home forum try issues which have been raised or could have been raised in the action before this Court. Consequently, it must be found that the English action was commenced in bad faith.

III. Conclusion of Law In Re Permanent Injunction

1. This Court has in personam jurisdiction over the Excess Insurers.

Source: Orders of April 19, 1979, and June 25, 1979, which are the law of the case. This Court determined that it has in personam jurisdiction over the Excess Insurers after receiving nine briefs, some thirty-seven affidavits from the Excess Insurers, two days of evidence presented at a hearing, and three oral arguments dealing with the subject. The Court based its finding of in personam jurisdiction on the Pennsylvania long arm statute, on the fact that the Excess Insurers derived profits out of Pennsylvania, on the fact that the Excess Insurers adopted a Pennsylvania insurance contract, on the fact that the Excess

Insurers have frequently as a matter of practice authorized the Pennsylvania Insurance Commissioner to accept service of suit in their behalf, on the fact that they have submitted to the jurisdiction in this case, and, as a matter of sanction, on the fact that they failed to produce documents relating to their Pennsylvania business after being repeatedly ordered to do so by this Court.

2. This Court has the power to enjoin parties within its jurisdiction to desist from prosecuting in other Courts suits which are vexatious and duplicative of actions before this Court.

(See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 3-7 and authorities cited therein.)

3. The Court's power to enjoin parties from prosecuting duplicative suits

includes the power to enjoin further prosecution of suits commenced in other countries, and especially since the litigation in the above-captioned case was begun over four and one half years ago.

(See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 3-4, and authorities cited therein.)

4. As a matter of law, the English action is duplicative, vexatious, harassing and results in irreparable injury to CBG, and CBG has no other adequate remedy, except injunctive relief.

(See Plaintiff's Post-Hearing Memorandum re Permanent Injunction, pp. 7-11, and authorities cited therein)

5. In the interests of justice and in light of the foregoing findings of fact the Excess Insurers must be enjoined permanently from further prosecuting the

English action and any other action which duplicates matters and issues involved in the present case before this Court.

IV. Permanent Injunction Order

AND NOW, this 5th day of AUGUST, 1980, in consideration of evidence and arguments presented at hearings before this Court on April 18 and 19, 1979, November 5, 6 and 7, 1979, and April 8, 1980, and in consideration of the Court's findings that the suit instituted by the Excess Insurer Defendants (being all of the defendants with the exception of Defendant Insurance Company of North America) in the High Court of Justice, Queen's Bench Division, at 1979-I-No. 1727, over whom this Court has in personam jurisdiction, is duplicative of the

present action before this Court, involving the same parties, the same subject matter, the same issues and the same evidence as the case before this Court, and that Plaintiff would suffer irreparable injury if it were forced to litigate both actions simultaneously, and that the interests of justice require that the Excess Insurer Defendants be enjoined from prosecuting the aforementioned suit which they have commenced in London; and adopting and incorporating herein the findings of fact and conclusions of law made by this Court on April 19, 1979; and further adopting and incorporating herein the findings of fact and conclusions of law hereinabove made and entered by this Court simultaneously with the entry of this Order; IT IS HEREBY ORDERED that the

Excess Insurer Defendants, their respective attorneys, employees, and agents, and each of them, desist from and discontinue any further prosecution of the suit instituted by them in the High Court of Justice, Queen's Bench Division, at 1979-I-No. 1727, and that they desist from filing any other actions in any Court relating in any manner to issues and matters in this action before this Court during the pendency of the present action, and that services of the Order shall be effective upon delivery of a copy of this Order to the Pittsburgh counsel of the Excess Insurer Defendants, and that supplementary service of this Order may be made by the delivery of copies of this Order to the London solicitors of the Excess Insurer Defendants by any competent adult; and that the preliminary injunction

entered on April 19, 1979, shall be in full force and effect as to each Excess Insurer Defendant until that Defendant is effectively served with this permanent injunction Order.

/s/ Paul A. Simmons
UNITED STATES DISTRICT JUDGE

Opposition

No. 81-290

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COMPAGNIE DES BAUXITES DE GUINEE,
a corporation,

petitioner

v.

THE INSURANCE CORPORATION OF IRELAND, LTD., EAGLE STAR INSURANCE CO. LTD., HANOVER INSURANCE COMPANY, CONTINENTAL ASSURANCE COMPANY OF LONDON LTD., THE CENTURY INSURANCE CO. LTD., YUVAL, THE INSURANCE COMPANY OF ISRAEL LTD., HOME INSURANCE CO. LTD., SLATER, WALKER INSURANCE CO. LTD., YASUDA FIRE & MARINE INSURANCE CO. (UK) LTD., NICHIDO FIRE & MARINE INSURANCE CO. LTD., TUREGUM INSURANCE COMPANY, SAHAR INSURANCE CO. LTD., EXCESS INSURANCE CO. LTD., TRIDENT INSURANCE CO. LTD., VESTA (UK) LTD., CHIYODA FIRE & MARINE INSURANCE CO. LTD., TOKYO, STRONGHOLD INSURANCE CO. LTD., BRITISH RESERVE INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., CONSOLIDATED EUROPEAN REINSURANCE CO. LTD., L'UNION ATLANTIQUE S.A. D'ASSURANCES, BRUSSELS,

respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. May an American court, consistent with the principles of international comity, enjoin non-American corporations domiciled or doing business in a foreign country from suing in a court of the foreign country on a contract made in the foreign country?

2a. Where some of the defendants failed to produce records of their business relating to the forum state because no such records existed, may the district court impose sanctions finding them subject to personal jurisdiction for disobedience to the court's production order?

2b. Where the district court has barred defendants from obtaining and offering evidence that they were not doing business in the forum state, may the district court find that they were doing business there from evidence offered by plaintiff which defendants were forbidden to answer?

STATEMENT UNDER SUPREME COURT RULE 28.1

A listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the respondents having any such related companies is contained in appendix N to the cross-petition for certiorari filed by respondents in this proceeding, pages 91a-94a. The following should be added:

All the stock of respondent Vesta (UK) Ltd., a British corporation, is owned by Vesta Insurance Company, Ltd., a Norwegian mutual insurance company.

Ninety percent of the stock of L'Union Atlantique S.A. d'Assurances, Brussels, is owned by American International Underwriters Overseas, Ltd., a Bermuda corporation, all the stock of which is owned by American International Group, Inc., a Delaware corporation.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Answer to petitioner's statement of the case

Petitioner's statement of the case contains, in addition to the statement, argument in support of petitioner's contentions. Petitioner argues (pp. 6-7) that respondents' "only reason for commencing the English action was to harass the petitioner and further delay the American action." The charge of attempt to delay is later repeated (p. 19).

The purpose of the English action was to obtain a declaration that the English respondents were not liable to petitioner, so that they would not have to present their defenses in a distant American court where they could not obtain necessary testimony from English witnesses who successfully resisted respondents' attempts to take their depositions, but who can be made to testify at a trial in London. Respondents made no attempt to delay the American action. The filing of an action in London could not possibly delay the progress of an action already filed in America. Petitioner's statements on this point (pp. 7, 19) are flatly incorrect.

The district court's findings of harassment, vexatiousness (No. 66, appendix B, p. 31) and bad faith (No. 70, p. 32) were based solely on the fact that the English action was in many respects duplicative of the American, and not on any actual intent or attempt on the part of respondents to harass or vex petitioner, of which there was no evidence at all.[1] Petitioner states

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1. For an action to be vexatious, it must have been brought maliciously and without probable cause: *Paramount Pictures v. Blumenthal*, 216 App. Div. 756, 11 N.Y.S.2d 768 (1939), app. dismd. 281 N.Y. 682, 23 N.E.2d 15 (1939); *Calvo v. Barlotta*, 12 Conn. 396, 152 Atl. 311 (1930).

(p. 8) that the court of appeals did not reverse those findings. Those findings are really a conclusion. The holding of the court of appeals was that a suit in a foreign court could not properly be enjoined even if it was duplicative. There was no need for the court of appeals to consider whether or not it was actually harassing, vexatious or in bad faith, because the most that those findings imported was that the English action was duplicative of the American.

Answer to petitioner's argument in support of reasons for granting the writ

1. ANSWER TO ARGUMENT AS TO THE INJUNCTION.

Petitioner's argument does not address the fundamental prerequisites of comity between courts of different sovereignties. The general rule is that a court of one sovereignty will not interfere with proceedings in a court of another sovereignty in an ordinary action in personam. "... it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other": *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). This has long been the rule, as stated by Mr. Justice Black in *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964). Insofar as it prohibited federal court interference with state court proceedings, the rule was confirmed by Congress in the Act of March 2, 1793 (1 Stat. 333, §5), as last amended by the Act of June 25, 1948 c.646 (62 Stat. 869, 968, 28 U.S.C. §2283). Exceptions made from time to time are recounted by Mr. Justice Frankfurter in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941).

In applying the rule, Mr. Justice Sutherland said in *Kline v. Burke Construction Co.*, 260 U.S. 226, 231-2 (1922), quoting from *W. E. Stewart Land Co. v. Arthur*, 267 Fed. 184, 185 (8th Cir. 1920):

> "'. . . The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course.'"

As will be shown below (p. 5), the rule is not restricted to situations involving conflicts between state and federal courts in the United States. The rule is applied as between courts of any different sovereignties.

Petitioner argues (p. 9) that the Third Circuit extended *Donovan v. City of Dallas*, 377 U.S. 408 (1964), creating a new rule in conflict with prior decisions of other circuits, citing (pp. 10-11) four courts of appeals cases, two district court cases, and one old circuit court case. None of those cases conflicts with the decision reversing the injunction in the case at bar. In one[2] of them an injunction was refused, and in two[3] of them the injunction which had been granted was vacated. Another[4] was a damage action in which no injunction was sought. In it, as well as in the case first mentioned, the opinions stated that courts have power to enjoin vexatious suits. As a matter of comity, however, they must not, and usually do not, do so.

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2. *Western Elec. Co. Inc. v. Milgo Electronic Corp.*, 450 F.Supp. 835 (S.D. Fla. 1978).

3. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Sperry Rand Corporation v. Sunbeam Corporation*, 285 F.2d 542 (7th Cir. 1960).

4. *Velsicol Chemical Corp. v. Hooker Chemical Corp.*, 230 F.Supp. 998 (N.D. Ill. 1964).

One of the cases relied on by petitioner[5] involved only federal courts. In it the Court of Appeals for the Tenth Circuit followed the established rule that as among courts of the same sovereignty the first to obtain jurisdiction has precedence over others subsequently acquiring jurisdiction. The court also discussed the rules applicable to courts of different sovereignties, pointing to the exception for proceedings in rem, in which case "the state or federal court having custody of the property has exclusive jurisdiction to proceed," (459 F.2d at p. 331). This was the situation in the circuit court case[6] relied on by petitioner, where the California federal court (to which the proceedings had been removed from the state court), having jurisdiction of the res, a pledge by plaintiff of stock in one of the defendant companies to the other defendant company, relating to land in California, enjoined defendants from prosecuting an action which they subsequently brought in England to foreclose on the pledge.

The only case among those relied on by petitioner which even approaches similarity to the case at bar is *Harvey Aluminum*[7] *v. American Cyanamid*, 203 F.2d 105 (2d Cir.1953), cert. den. 345 U.S. 964, where plaintiff, having sued defendant in the Southern District of New York, sought to discontinue that action with the intention of instituting another on the same grounds in British Guiana. Respondents at bar are not in the position of Harvey Aluminum Inc. They have not filed one suit and then a second in a foreign court on the same cause of action. On the contrary, after being sued in a court foreign to them, they have filed a suit in their home forum.

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5. *O'Hare International Bank v. Lambert*, 459 F.2d 328 (10th Cir. 1972).

6. *Gage v. Riverside Trust Co.*, 86 Fed. 984 (S.D. Calif. 1898).

7. A predecessor company to Halco (Mining) Inc., the owner of 51% of petitioner's stock (Appendix B to petition, p. 2).

If any suit is vexatious, it is the present action brought by plaintiff in Pennsylvania, a jurisdiction with which none of the parties, plaintiff or defendant, has any connection at all.

Donovan v. City of Dallas, supra, forbad a state court to enjoin plaintiffs there from also prosecuting a federal action. Petitioner complains that the Third Circuit extended the *Donovan* case to authorize a federal court to enjoin defendants from prosecuting a foreign action. The principle or rule of law on which the *Donovan* holding was based is not confined to the relationship of state courts to federal courts; it is a general rule applicable to the relationship of the courts of one sovereignty to those of any other sovereignty. It has been applied as between the court of one state and the court of another state,[8] between the court of a state and the court of a foreign government,[9] and between a federal court and the court of a foreign government.[10]

In the latter situation, in the *Canadian Filters* case (fn. 10) the Court of Appeals for the First Circuit vacated an order of the District Court for the District of Massachusetts which had enjoined the parties before it from further litigating an action filed by the defendant in the

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8. *Lazarow, Rettig & Sundel v. Castle Capital*, 63 App. Div. 2d 277, 407 N.Y.S.2d 490 (1978), reversed on certified question not here involved, 49 N.Y.2d 508, 404 N.E.2d 130 (1980); *South Federal Street Assoc. v. Iron Fireman Mfg. Co.*, 23 Misc.2d 1070, 201 N.Y.S.2d 579 (Supr. Ct. 1960).

9. *Roberts Rlty. of B. Ltd. v. Miller & Solomon (B.), Ltd.*, 234 So.2d 417 (Fla. App. 1970).

10. *Canadian Filters (Harwich) Limited v. Lear Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969); *Chase Manhattan Bank v. State of Iran*, 484 F.Supp. 832 (S.D.N.Y. 1980), where the District Court in New York refused to enjoin defendants from further prosecution of an action brought by Bank Markasi, the central bank of Iran, against Chase in England.

Exchequer Court of Canada. Petitioner attempts (pp. 12-13) to distinguish this case on the ground that the Canadian suit was filed three weeks after the Massachusetts suit, whereas respondents' English action was filed three years after petitoner's Pennsylvania action. No authority is cited in support of the proposition that comity is governed by a time interval, and no reason for such a rule can be imagined.[11]

Petitioner also attempts (pp. 13-14) to distinguish the *Canadian Filters* case, supra (fn. 10), on the ground that there the district court had reserved decision on one of the two patents in suit until it had dealt with the other and had not dealt with either, holding the whole matter in abeyance. The court of appeals, in following the general rule of noninterference with an action in another sovereignty, held that no exception to the rule could be made merely because the district court had held everything in abeyance. The decision did not turn on the abeyance point.

The fallacy of petitioner's entire contention appears in its statement (pp. 14-15) that the "Court should issue the writ to determine . . . whether a district court has the power to enjoin vexatious and harassing foreign suits." The question does not involve the district court's power —that is conceded—but whether as a matter of comity the court should exercise it.[12] The *Donovan* decision held that it was error for a state court to exercise such

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11. The reason for respondents' delay in filing their suit in England was that it was not until the deposition of plaintiff's general manager in Guinea was taken, in November, 1978 (Appendix to cross-petition for certiorari, p. 72a), that respondents obtained evidence that damage to petitioner's plant had already occurred before the insurance was written, which fact had been concealed from respondents' underwriters when they accepted the risk.

12. Judge Aldisert made this clear in his opinion below (Appendix A to petition, p. 20, first paragraph).

power with respect to an action pending in a federal court. In that situation the two sovereignties, state and federal, exercise concurrent jurisdiction in the same geographical territory. This is peculiar to a federated form of republic composed of independent sovereign states. The rule is not restricted, however, to that situation. It has long been followed as between courts of concurrent jurisdiction in separate territories: *Bayley v. Edwards*, 3 Swanst. 703 (1792), where, on an appeal from the Chancery court of Jamaica, the Privy Council held that a plea of an equity suit pending in England was not a good plea in bar to a subsequent suit in Jamaica for the same matter. The same rule obtains today: *Castanho v. Brown & Root (UK) Ltd.*, [1980] 3 All E.R. 72 (Ct. of App.).

Petitioner next attempts to argue the merits of respondents' English action, saying (p. 17) that respondents' barrister admitted that respondents had "waived any right they might have had to rescind the insurance policy based on these 'material nondisclosures.'" Respondents' barrister admitted that some of the nondisclosures had been waived, but not the nondisclosure first brought to light by the deposition testimony of plaintiff's general manager in Guinea given in November, 1978 (fn. 11, supra, p. 6), as to which the barrister testified (Appendix in Court of Appeals, p. 922a): "Here was a nondisclosure point which clearly had not been waived".[13]

In further attempt to show bad faith on the part of respondents, petitioner states (pp. 18-19) that respondents noticed foreign depositions for the purpose

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13. Petitioner's other statements (pp. 16-17) of alleged admissions are also not supported by the record.

of refuting petitioner's charge of harassment. The record is void of evidence of any such purpose on respondents' part.

Petitioner then argues (p. 18) that respondents' taking of depositions in London and not using them at the permanent injunction trial evidenced bad faith. The taking of depositions, for possible use at trial,[14] cannot be said to constitute bad faith. Petitioner also took the depositions of twelve of respondents' representatives in London (Appendix to cross-petition, p. 83a).

Petitioner next charges (p. 18) bad faith because the transcripts have not been filed. Petitioner is mistaken in saying (p. 18) that respondents "have filed none of these depositions." The transcript of the deposition of Yves De Nys was filed on January 16, 1980. Petitioner also has not filed any of the transcripts of the twelve depositions which it took. The reason the transcripts of all the depositions except that of M. De Nys have not been filed is that counsel for the respective parties have agreed that the transcripts should be retained by counsel for respondents until all corrections are agreed upon and made. Petitioner has not requested that any of the transcripts be filed. Petitioner's argument on this point is nothing more than a red herring.

2. Answer to argument as to the dismissal of three respondents

Petitioner's argument concedes, inferentially if not expressly (p. 25), as it must, that the District Court

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14. It was not until after respondents' notice of depositions in London had been served (June 1, 1979) that petitioner sought (June 15) and obtained (June 25) a protective order (Appendix to cross-petition, p. 59a) barring respondents from obtaining evidence they had intended to use at the permanent injunction trial.

improperly imposed sanctions on the three respondents (defendant-appellants below) who had no records to produce. Petitioner argues, however (pp. 22-24), that even without the sanction the record contained sufficient evidence to establish personal jurisdiction over those three respondents, and that the District Court so found (pp. 22-24).

The fatal gap in petitioner's contention lies in the fact that the evidence on which it rests was presented only at the preliminary injunction hearing, and that some of that evidence, for example the evidence given by the forum state broker (p. 24), consisting of an affidavit and not testimony subject to cross examination, was not admissible[15] upon the trial on the merits at the final injunction hearing.

Although F.R.C.P. 65(a)(2) provides that "evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial," it is beyond dispute that the findings and conclusions of the court issuing a preliminary injunction are not final or conclusive: *Railroad Yardmasters v. Pennsylvania Railroad Company*, 224 F.2d 226 (3d Cir. 1955), even though they relate to the merits of the case: *N.L.R.B. v. Acker Industries, Inc.*, 460 F.2d 649 (10th Cir. 1972). This includes findings as to jurisdiction: *Carroll v. Associated Musicians of Greater*

15. It is hornbook law that an affidavit is not competent evidence: Marshall, C.J., in *M'Iver v. Kyger*, 3 Wheat (17 U.S.) 53 (1818). Although an affidavit is admissible at a hearing for preliminary injunction, if the chancellor considers it at the final hearing and grants a permanent injunction, the injunction must be reversed: *National City Bank v. National City Window Clean. Co.*, 174 Ohio St. 510, 190 N.E.2d 437 (1963). For the same reason Judge Simmons' finding of personal jurisdiction as to all the respondents at the final hearing must be reversed.

New York, 206 F.Supp. 462, 473 (S.D.N.Y. 1962), aff'd 316 F.2d 574 (2d Cir. 1963). The "findings of fact made upon the motion for preliminary injunction are not controlling, and the parties will be free to retry the issues at the hearing on the permanent injunction which will follow": *Imperial Chem. Indus. Ltd. v. National Distillers & Chem. Corp.*, 354 F.2d 459, 463 (2d Cir. 1965). "On the trial on the merits of the case the issues must then be tried as though no temporary injunction had been applied for or issued": *Paschall v. Kansas City Star Co.*, 441 F.Supp. 349, 355-6 (W.D. Mo. 1977), citing *Benson Hotel Corporation v. Woods*, 168 F.2d 694, 697-8 (8th Cir. 1948).

From the foregoing it is crystal clear that at the hearing on permanent injunction plaintiff was required to prove personal jurisdiction of the court over the excess insurer defendants, and that the Court's finding of such jurisdiction made at the preliminary hearing was not conclusive or res judicata of the question. While it is true, under F.R.C.P. 65, that the Court may consider the evidence offered at the preliminary hearing, he is free to change his finding based on such evidence, which he must do if he was wrong: *Imperial Chem. Indus. Ltd. v. National Distillers & Chem. Comp.*, supra (354 F.2d at p. 463).

The District Court having found personal jurisdiction over respondents based both on the sanction and on other evidence (49a-53a, 75a-76a), respondents set about obtaining evidence to refute the other evidence, only to be thwarted by the Court's order of June 25, 1979 (Appendix to cross-petition, p. 59a) prepared and submitted by petitioner, forbidding them to do so, the Court saying in that order, as well as in another entered the same day (id., 57a), that at the final hearing he would receive no

further evidence on the question of the Court's in personam jurisdiction over respondents.

The District Court nevertheless based his jurisdiction decision at the final hearing not only on the sanction order but also on the evidence adduced at the preliminary hearing, which respondents had been forbidden to answer. Such a denial of due process is little short of shocking.

The Court of Appeals based their decision only on the sanction and not on the other evidence on which the District Court had relied (Appendix A, p. 17, fn. 9), holding that the sanction could not properly be imposed on the three respondents who had no Pennsylvania records to produce. Without the other evidence, nothing was left to support personal jurisdiction over those three respondents, who thus emerged from the case lily-white.

Petitioner argues (pp. 25-26) that the Court of Appeals should have reversed the imposition of sanctions on the three lily-white respondents and remanded the case to the district court for a new determination as to jurisdiction over them. Thus petitioner, after having barred the use of evidence which it now believes it needs, seeks a reversal of the very orders it prepared and submitted to the District Court for signature. Such a change of position on petitioner's part should not be countenanced by the Court. If, however, any reversal of those orders is to be made, it should be made as to all the respondents, and a full hearing held on jurisdiction as to all of them, after discovery and examination by petitioner of all the records in London, as previously offered.

If this is not done, then the Court of Appeals' dismissal of the three lily-white respondents must stand.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-290

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

COMPAGNIE DES BAUXITES DE GUINEE,

Petitioner,

v.

THE INSURANCE CORPORATION OF IRELAND, LTD., et al.,

Respondents.

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

BRIEF IN REPLY

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REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents concede in their brief in opposition (pp. 3, 6) that a district court has the power to enjoin parties before it from prosecuting a vexatious and harassing foreign suit. Their argument is reduced to the suggestion that, as a matter of comity, that power should not have been exercised in the instant case.

Respondents ground their legal authority for this position, as did the court of appeals in its opinion, on this Court's decision in Donovan v. City of Dallas, 377 U. S. 408 (1964). Contrary to petitioner's assertions, and this Court's General Atomic Co. v. Felter, 434 U. S. 12, 16 (1977) opinion, both respondents and the court of appeals seek to extend the application of Donovan beyond

state court injunctions against federal court actions to federal court injunctions against foreign actions.

Respondents' brief relies on two cases to justify this extension of Donovan: Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969) and Chase Manhattan Bank v. State of Iran, 484 F. Supp. 832 (S.D.N.Y. 1980) (p.5n.10). Canadian Filters, as argued in the petition for certiorari (pp. 12 - 14), is inapposite to the present case. Respondents' attempt in their brief to resurrect Canadian Filters (p. 6) is confused and, to the extent it makes any sense, it fails. The First Circuit stated that

> Doubtless there are times when comity . . . must give way . . . . . However, these exceptions do not apply to this case where the subject matter of the foreign suit is a separate, independent foreign patent

> right. . . . Indeed, the court did not even reach the stage of comity vel non. . . . [T]he court summarily placed the whole matter in abeyance. . . . We cannot recognize layaway jurisdiction as a basis for enjoining other jurisdictions.

412 F.2d at 578 - 79. The court's decision did indeed turn on what the respondents call "the abeyance point" and any comparison of Canadian Filters to the instant case, where the issues in the two actions were the same and the district court retained jurisdiction over all the issues, is of no value.

Chase Manhattan Bank, supra, is of equally little value to the respondents. The court there stated that the power of a court to enjoin a party from litigating in a foreign forum is clear and that "such an injunction can be entered where the second action is vexatious . . . ." 484 F. Supp. at 836. The court

pointed out that the London action was commenced prior to the American action and that the London action could not be considered to involve a vexatious choice of forum. In the instant case the American action was brought over three years prior to the London action and the London action, brought on sham grounds, clearly fits the definition of vexatious.

Respondents and the court of appeals have been led astray, we believe, by their improper extension of this court's holding in Donovan. On the basis of Donovan the court of appeals thought it proper to totally ignore the findings of the district court that the London proceedings were harassing and vexatious. Without those findings to support an injunction against continuation of the proceedings, the court of appeals was left only with considerations of comity, and it

held that comity forbids the injunction. However, we believe the court of appeals erred in using Donovan to dismiss the district court's findings of vexatiousness and harassment. It is true that such findings were found in Donovan to be insufficient to support an injunction against proceedings in a federal court, but in Donovan the Court was dealing with the absolute constitutional bar against state court injunctions which interfere with rights granted by Congress. Even where Congressionally granted rights are exercised in a vexatious and harassing manner, state courts, in our federal system, cannot enjoin the federal proceedings. This holding regarding the relevance of vexatiousness and harassment is wholly inapplicable when the state-federal problem is not present. Federal courts in other circuits, when considering their

power to enjoin actions in foreign countries, have focused on the presence of vexatiousness and harassment as circumstances justifying such an injunction. The Third Circuit should have followed their reasoning and should not have been misled into an overextension of the Donovan doctrine, beyond the state-federal context. This Court should review the decision of the Court of Appeals to clarify the question of whether vexatiousness and harassment are sufficient to justify an injunction against foreign proceedings.

Respondents' attempt to demonstrate that their London action was not harassing and vexatious is unsuccessful. The petition points out the lead respondent's admission that five of the seven "material nondisclosures" alleged in the London action were not material at all

and would not be expected to be disclosed. Respondents' brief does not refute this point, but merely states in a footnote that "Petitioner's other statements (pp. 16 - 17) of alleged admissions are also not supported by the record" (p.7n.13). Indeed, the testimony of the respondent witnesses as deposed by the respondents in London, and the cross examination testimony of the lead underwriter at the injunction hearing support the admission that these allegations of the London complaint were neither "material" nor "nondisclosures." Although petitioner can not plumb the minds of respondents to determine their motives, perhaps their inability to have transcript corrections made in over two years' time since these depositions were taken results from their desire to avoid the embarrassment of

countless statements on the record revealing the London action to be a sham.

Respondents allege that one of their alleged "nondisclosures" was not waived and that they delayed over three years in bringing their London action because this "nondisclosure" was not discovered until November 1978 (pp. 6n.11,7). Respondents fail to point out that this allegedly non-waived "nondisclosure" was included as the sixth defense to their amended answer, filed in February 1976. Respondents' brief also fails to explain why they failed to file suit while allegedly aware of six "nondisclosures" for over three years and why, having waived these claims, they chose to include them in the action they ultimately did bring. In short, respondents have failed to deflate the accurate findings of the

district court that the London action was brought in bad faith to vex and harass petitioner.

The petition for writ of certiorari also seeks review of the dismissal of the complaint against three of the respondents for lack of in personam jurisdiction. Respondents' reply is that the evidence relied upon by the district court, which was not reviewed or found erroneous by the court of appeals, was incompetent because it was introduced at a preliminary injunction hearing. Respondents argue that the finding of in personam jurisdiction made by the district court before it issued its preliminary injunction was not conclusive, and that it should have been reviewed at the time of the permanent injunction hearing.

Respondents' brief omits the history of the in personam jurisdiction

issue in the district court. Respondents' motion for summary judgment seeking dismissal for lack of in personam jurisdiction and forum non conveniens was briefed and argued extensively. The respondents submitted 37 affidavits and filed 5 briefs in support of the motion; plaintiff filed 8 affidavits and 4 briefs. Arguments dealing with the motion were heard on July 27, 1978 and February 8, 1979, before the preliminary injunction was argued on April 18 - 19, 1979. The district court had received sufficient evidence from the time the motion for summary judgment was filed on May 20, 1977 to determine, as it was required to do before issuing its preliminary injunction, that it had in personam jurisdiction over the respondents.

In addition, the district court's finding of jurisdiction was also

based upon its sanction. Rule 37(b)(2)(A) made clear that a court may order that a matter "shall be taken to be established for the purposes of the action . . . ." Although preliminary injunction findings generally may be overturned by later evidence presented at a permanent injunction hearing, facts established through the issuance of a sanction are finally established for the purposes of the case. Once the district court denied the motion to dismiss on the ground of an alleged lack of in personam jurisdiction, doing so not only on the basis of numerous affidavits and arguments presented over the course of nearly two years, but also on the basis of its sanction, the issue of in personam jurisdiction was finally decided in the case.

CONCLUSION

For the foregoing reasons, and those presented in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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